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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROLE MODELS AMERICA, INC.,

Petitioner,

v.

FRANCIS J. HARVEY, SECRETARY OF THE ARMY, MARGARET SPELLINGS, SECRETARY OF EDUCATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901-2911, 104 Stat. 1485, 1808-19, codified as amended at 10 U.S.C. § 2687 note (2000) ("Base Closure Act" or "BCA"), creates statutory procedures for the sale of closed military-base property. As relevant here, the Base Closure Act requires that the Secretary of Defense and a Local Redevelopment Authority ("LRA") conduct parallel, contemporaneous screenings for non-commercial uses of surplus base property by issuing a notice of availability to both (i) representatives of the homeless and (ii) "other interested parties." BCA § 2905(b)(7)(f). After these screenings are completed and the LRA formulates a plan for the property, the LRA may then submit the plan to the Secretary of Housing and Urban Development for approval. *Id.*

The question presented is whether the Court should grant certiorari to remove a barrier to adjudication of Petitioner's claims arising from Respondents' violations of the procedures mandated by this carefully crafted statutory regime that was erroneously erected by the lower courts' misapplication of the mandate rule in a manner that (i) conflicts with well-established precedents of this Court and Petitioner's rights, and (ii) contravenes the statutory regime's requirement of contemporaneous parallel screenings for potential conveyance of surplus military-base property for the benefit of the homeless and for other public benefit uses.

CORPORATE DISCLOSURE STATEMENT

Role Models America, Inc. is a Maryland non-profit corporation, tax-exempt under 26 U.S.C. § 501(c)(3), that seeks to provide military-style preparatory academies for out-of-school, at-risk youth in America. Role Models America, Inc. has no parent company, nor does any publicly-held company have a ten (10) percent or more ownership interest in Role Models America, Inc.

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PRELIMINARY STATEMENT

This case arises from Respondents' violations of the detailed federal statutory and regulatory regime governing the disposition of surplus military-base property that is part of the Fort Ritchie Military Reservation in Cascade, Maryland, which became available under the provisions of the Federal Property and Administrative Services Act of 1945, codified as amended at 40 U.S.C. § 484(k), and the Base Closure Community Redevelopment and Homeless Act of 1994, codified as amended at 10 U.S.C. § 2687 note.

Petitioner is Role Models America, Inc. ("RMA"), a non-profit institution that seeks to convert surplus military bases into military-style preparatory academies for out-of-school youth. In July 2001, RMA filed a complaint in the U.S. District Court for the District of Columbia, asserting that Respondents, the Secretary of the Army and the Secretary of Education (collectively, the "Government") failed to follow the regime's carefully crafted procedures in disposing of the Fort Ritchie property, including with respect to the required parallel screenings for potential conveyance of the property for the benefit of the homeless and for any other "public benefit" use by a state, local or non-profit entity, thereby unlawfully and unjustly depriving RMA of a statutorily mandated opportunity to compete for conveyance of the Fort Ritchie property in furtherance of its mission. At the same time, RMA moved for preliminary injunctive relief.

The district court denied RMA's motions and RMA appealed. On February 4, 2003, the D.C. Cir-

cuit reversed. After explaining the statutory and regulatory regime's notice requirements and mandated parallel processes for screening proposals to use the property for, on the one hand, purposes of providing services to the homeless and, on the other hand, other public benefit uses, the D.C. Circuit concluded that the Government had violated applicable statutory and regulatory requirements in not screening for public benefit uses and remanded the case to the district court with instructions to enter a permanent injunction against conveyance of the property until the Government complied with those requirements.

On remand, the Government published its intention to consider at the same time notices of interest from representatives of the homeless and from other interested parties, but later announced that it would not screen for homeless purposes, notwithstanding the regime's requirement of parallel screenings for homeless purposes and other public benefit uses and that its prior screening for homeless purposes was outdated because it had been conducted years before, in 1996.

RMA's program is and always was designed as an educational program to benefit out-of-school youth, including the homeless, and RMA had on another occasion submitted dual applications for both homeless purposes and for a public benefit conveyance in connection with another base closure. Accordingly, RMA protested the Government's decision not to screen for homeless uses after remand. RMA later filed an amended complaint as of right, pursuant to

Rule 15(a) of the Federal Rules of Civil Procedure, that raised (among other defects) the Government's violation of the requirement to conduct contemporaneous, parallel screenings for homeless purposes and for other public benefit uses, which occurred after remand.

In 2004, the Government moved to dismiss, asserting that it had cured all procedural deficiencies. The district court denied that motion on the ground that the proposed redevelopment plan was prepared before the completion of the public benefit screening, rather than after the screening, as required by the governing law. As a result, the Government remained enjoined from conveying the property until it complied with all required procedures.

In 2006, the district court dismissed the case on the ground that RMA was not a "homeless provider" and therefore lacked standing to pursue its claims in connection with the Government's failure to re-screen for homeless purposes after remand. On appeal, the D.C. Circuit ruled that the question of whether RMA had standing as a homeless provider "seems to us beside the point" because the mandate rule operated to deprive the district court of authority to order a re-screening for homeless purposes.

As discussed below, the D.C. Circuit misapplied the mandate rule in a manner that (i) conflicts with well-established precedents of this Court and RMA's rights under the Due Process Clause and the Federal Rules of Civil Procedure; and (ii) contravenes the statutory regime's requirements, including the requirement of contemporaneous parallel screenings

for potential conveyance of the property for the benefit of the homeless and for other public benefit uses. As a result, important questions of federal law concerning the administration of the base closure laws that were properly raised in this case were never adjudicated. The Court should grant the petition to ensure that the Government complies with the procedures mandated by the applicable statutory and regulatory regime in distributing valuable surplus military property under the Base Closure Act, and that RMA is not unlawfully and unjustly deprived of the right to a ruling on the merits of its properly raised claims.

OPINIONS BELOW

The first district court opinion in this case ("*Role Models I*"), Petitioner's Appendix ("PA") 67a, is reported at 193 F. Supp. 2d 76 (D. D.C. 2002). The first opinion of the court of appeals ("*Role Models II*"), PA 54a, is reported at 317 F.3d 327, 329 (D.C. Cir. 2003). An intermediate district court opinion ("*Role Models III*"), PA 29a, is unpublished, but may be found at 2005 U.S. Dist. LEXIS 23513 (D.D.C. 2005). The third opinion of the district court ("*Role Models IV*"), PA 8a is reported at 459 F. Supp. 2d 28 (D.D.C. 2006). The second opinion of the court of appeals ("*Role Models V*"), PA 1a, is reported at 514 F.3d 1308 (D.C. Cir. 2008).

JURISDICTION

The court of appeals entered judgment on February 5, 2008. RMA timely filed a petition for rehearing and suggestion for rehearing en banc, which was

denied on April 11, 2008. PA 94a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The following statutes and regulations are relevant to this petition and are reproduced, in pertinent part, in Petitioner's Appendix:

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, §§ 2901-2911, 104 Stat. 1485, 1808-19 codified as amended at 10 U.S.C. § 2687 note (2000) ("Base Closure Act" or "BCA").[1]

Revitalizing Base Closure Communities – Base Closure Community Assistance (Regulations), 32 C.F.R. Part 176 (Department of Defense), 24 C.F.R. Part 586 (Department of Housing and Urban Development).

Also relevant is Rule 15(a)(1) of the Federal Rules of Civil Procedure, which provides, in pertinent part, that "[a] party may amend its pleading once as a matter of course: (A) before being served with a responsive pleading: . . ."

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[1] For ease of reference, all citations to the Base Closure Act are to the relevant sections of the Act as it appears in the note following 10 U.S.C. § 2687. The Act will be cited as "BCA § ___." The Base Closure Act covers both the process and procedures for making and approving base closure and realignment decisions, *id.* at § 2903, and the process and procedures for implementing those decisions, once made, *id.* at § 2905. Only the latter process and procedures are relevant here.

STATEMENT OF THE CASE

A. RMA And The Fort Ritchie Property

RMA is a Maryland non-profit corporation founded by Dr. Robert Alexander, a former Army officer, White House staffer, CIA official, and businessman. RMA's mission is to acquire and convert surplus military base closure properties into military-style preparatory academies for the approximately ten million out-of-school, at-risk American youth under age 18, including 600,000 homeless youth and 1.3 million runaway homeless youth. PA 69a. RMA College Corps seeks to provide its students with the opportunity to learn leadership skills and discipline, earn a high school diploma, and be placed on a college-bound academic track.

A dozen retired admirals, generals, former school superintendents, and former cabinet-level government officials helped create RMA, and its program received widespread civic and broad-based and bipartisan congressional support. The Workforce Investment Act of Fiscal Year 1999-Fiscal Year 2002, in which Congress authorized $10 million in grant funding for RMA to be administered by the Department of Labor, provided RMA's start-up funding. *See* Pub. L. No. 105-220, § 169, 112 Stat. 936, 1028-30 (1998); H.R. Report No. 105-825, at 1257 (1998). The legislation required that RMA "use the assistance to establish an academy that consists of a residential center on the site of a military installation closed or realigned pursuant to a law providing for closures

and realignments of such installations." Pub. L. No. 105-220, § 169, 112 Stat. 936, 1028-30 (1998).

In 1996, the Fort Ritchie Military Reservation in Cascade, Maryland ("Fort Ritchie" or the "Property") was approved for closure and made available under the provisions of the Federal Property and Administrative Services Act of 1945 ("FPASA"), codified as amended at 40 U.S.C. § 484(k), and the BCA. PA 68a-69a.

In 1996, Dr. Alexander contacted the Local Redevelopment Authority at Fort Ritchie concerning the use of the Property for the RMA academy. RMA has diligently pursued its interest in obtaining the Property through the BCA process ever since.

B. The BCA Screening Process

The applicable statutes and regulations concerning the disposition of closed military-base property prescribe a carefully crafted, sequenced, and "hierarchical" screening process to determine how the property will be disposed of and reused. *See generally* Col. D.G. Ehrhart, *et al.*, *Transferring Use of Federal Real Property: A Challenge to Privatization*, 28 Pub. Cont. L.J. 43, 48-59 (1998); B.L. Ginsberg, *et al.*, *Waging Peace: A Practical Guide to Base Closures*, 23 Pub. Cont. L.J. 169, 186-94 (1994); Department of Defense, *Base Reuse Implementation Manual*, DoD 4165-66.M (Dec. 1997).

The screening process is governed principally by the BCA, which requires that the Secretary of Defense dispose of base property in accordance with pre-existing regulations governing the disposal of

surplus property promulgated under the FPAS. *See* 40 U.S.C. §§ 521, 541; BCA § 2905(b)(2)(A)(i). As one of the initial steps in the process, the Department of Defense is required to "recognize" a Local Redevelopment Authority ("LRA") for the facility. 32 C.F.R. § 176.20(a); 24 C.F.R. § 586.20(a). Although there is no record of that recognition step, PenMar Development Corporation ("PenMar"), a public corporation created by the Maryland legislature, was apparently recognized as the LRA for the Property in 1997. PA 12a. Once recognized, the LRA assumes an integral, statutorily mandated role in the screening process, acting as an adjunct and agent for the disposing military department, with specific responsibilities defined by federal regulation. *See* BCA U.S.C. § 2905(b)(7)(C), (D); 32 C.F.R. §§ 176.20(c), (d); 24 C.F.R. §§ 586.20(c), (d).

The screening process requires four sequenced stages: (i) to determine whether any other Department of Defense service has a need for the excess military property; (ii) to determine whether any other federal government agency has a need for the property; (iii) if no federal agency needs the property, to determine whether it is needed for homeless purposes or for any "public benefit" use by a state, local or non-profit entity, such as to utilize the property for a school; and (iv) if none of these public uses applies, to allow the property to revert to private commercial use through an economic development conveyance ("EDC") to or through the LRA.

In the first part of the screening process, the military department within the Department of Defense

responsible for the property must determine, within six months after the date of approval of the installation's closure, whether any other military department or federal agency has identified a use for the property. BCA § 2905(b)(5)(A). Once that internal screening process for possible federal agency re-use is completed, the military department is required, *inter alia*, to designate any property determined to be not needed as "surplus," and to publish the fact of that determination in the Federal Register and in a newspaper of general circulation in the community in the vicinity of the installation. *See* BCA § 2905(b)(7)(B)(i)(IV).

After the military department's publication of the initial notice of the existence of surplus property in the Federal Register, "the LRA *shall*: . . . [p]ublish, within 30 days, in a newspaper of general circulation in the communities in the vicinity of the installation, *the time period* during which the LRA will receive notices of interest from State and local governments, *representatives of the homeless, and other interested parties*." 32 C.F.R. §1 76.20(c)(1); 24 C.F.R. § 586.20(c)(1) (emphases added). The term "other interested parties" to be encompassed within this notice "includes any parties eligible for the conveyance of property of the installation under section 203(k) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 484(k) . . .) . . ., whether or not the parties assist the homeless." BCA § 2905(b)(7)(P).

As referenced in BCA § 2905(b)(7)(P), a conveyance of property under section 203(k) of the FPAS is

known as a "public benefit" transfer or conveyance, which may be at up to a 100% discount off the fair market value of the property. *See* BCA § 2905(b)(7)(K)(v); 32 C.F.R. § 176.5; 24 C.F.R. § 586.5. Given the sequenced hierarchical structure of the BCA's property-disposition provisions, the priority given to homeless purposes and to public benefit conveyances reflects a clear determination by Congress that such uses of closed military bases are preferred over commercial development of such sites under an EDC, even if the property is conveyed for free or at a 100% discount, and notwithstanding that a commercial development may be more attractive to the LRA or the community. This preference was reaffirmed by a 1999 Department of Defense Directive. *See* JA[2] 29-36 (Memorandum from Randall A. Yim, Deputy Under Secretary of Defense (Installations) to Deputy Assistant Secretary (Installations) of the Army, Navy, and Air Force 2 (October 29, 1999)) (reaffirming policy that: "No-Cost EDCs *should not be used to supplant existing public benefit conveyance authorities* . . . [Before pursuing an EDC], the Military Department must find that these public benefit conveyance authorities cannot be used to accomplish the long-term job creation and economic redevelopment goals.") (emphasis added).

While the LRA arguably has a conflict of interest arising from its ability to obtain the property itself if no appropriate public benefit use is identified, it nev-

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[2] The term "JA" refers to the Joint Appendix of record materials filed in the D.C. Circuit pursuant to that court's local rules.

ertheless has certain defined and federally mandated responsibilities in the public benefit conveyance screening process. Specifically, the regulations require an LRA to "work with the Federal agencies that sponsor public benefit transfers" to identify parties that might be interested in applying for public benefit transfers and to "make a reasonable effort to inform such parties of the availability of the property and incorporate their interests within the planning process." 32 C.F.R. § 176.20(d); 24 C.F.R. § 586.20(d).

After – and only after – it has issued the legally required notifications and considered any responses, including screening for both homeless purposes and public benefit conveyances, an LRA is then responsible for submitting an application and redevelopment plan to the appropriate military department and to the Department of Housing and Urban Development ("HUD") for approval, in which the LRA "*shall* consider the notices of interest received from State and local governments, representatives of the homeless, and other interested parties" and that "*shall include*, but not be limited to, entities eligible for public benefit transfers." 32 C.F.R. § 176.20(c)(5); 24 C.F.R. § 586.20(c)(5) (emphases added); *see also* BCA §§ 2905(b)(7)(C), (D) (same).

Although an LRA is an essential part of the process, the official public benefit conveyance screening is the primary responsibility of the military department, also known as the "disposal agency," to con-

duct in coordination with the federal "sponsoring agency."[3] Because the screening process is designed to identify eligible homeless and public benefit uses so that such uses may be duly considered for inclusion at the redevelopment planning stage, the statute and regulations specifically require that the screening process for *both* purposes occurs *before* a redevelopment plan is finalized. The sponsoring federal agency must consider any notices of interest submitted for homeless uses, and determine the eligibility of the applicant and use proposed in a request for a public benefit conveyance, "*before* submission of the redevelopment plan" by the LRA. BCA § 2905(b)(7)(K)(v) (emphasis added). The implementing regulations, in turn, expressly provide that "*[n]ot later than the LRA's submission of its redevelopment plan to DoD and HUD*, the Military Department will conduct an official public benefit transfer screening in accordance with the Federal Property Management Regulations (41 C.F.R. pt. 101-47.303-2) based upon the uses identified in the redevelopment plan." 32 C.F.R. § 176.45(a); 24 C.F.R. § 586.45(a) (emphasis added). Accordingly, the military department cannot make a final disposition decision until the required homeless and public benefit screening processes have been completed.

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[3] The federal agency with specific expertise and jurisdiction over the subject matter of a proposed public benefit use is known as the "sponsoring agency." In the case of a public benefit conveyance for educational use, the Department of Education is the sponsoring agency. *See* 40 U.S.C. § 549.

This parallel screening process is designed to give eligible nonprofit institutions notice and an opportunity to apply for a public benefit conveyance of surplus military property, while at the same time, representatives of the homeless can also apply for use of the base property. These processes are not mutually exclusive, and an organization may submit dual applications under both the homeless and the public benefit conveyance provisions.

C. The First Defective Screening Process

The screening process for the disposition of Fort Ritchie significantly deviated from the mandatory process required by statute and regulation.

On May 10, 1996, after Fort Ritchie was approved for closure, the Army published an initial notice of the availability of surplus property at Fort Ritchie in the Federal Register, which signified that the Property was not required for other federal government uses. 61 Fed. Reg. 21445 (May 10, 1996). The publication of this notice triggered the more specific obligation to "[p]ublish, within 30 days, in a newspaper of general circulation in the communities in the vicinity of the installation, the time period during which the LRA will receive notices of interest from State and local governments, representatives of the homeless, and other interested parties." 32 C.F.R. § 176.20(c)(1); 24 C.F.R. § 586.20(c)(1). Neither the LRA nor the Army complied with that requirement. Instead, on May 10, 1996, the LRA published a limited and narrow notice in a local paper, captioned "Homeless Assistance Outreach Initiative," stating that the LRA would only "receive Notices of Interest

from representatives of agencies that seek to serve the needs of our community's homeless population." JA 8-9. The LRA's notice stated that any responding Notices of Interest must include "a description of the proposed homeless assistance program." *Id.*

At no point was any notice published by the LRA or the Army in any newspaper or any publication that other interested parties could submit notices of interest in the surplus property at Fort Ritchie for a proposed public benefit use other than homeless assistance. Nor was any timeframe for the submission and consideration of such requests ever published.

As a result, the LRA's redevelopment plan was submitted to the Army and HUD and approved on December 15, 1997 prior to the conduct of any required public benefit conveyance screening, in violation of required procedures. JA 64 (March 30, 1998 letter from James S. Turkel, Chief, Real Estate Div., Department of the Army, to Mr. Robert Sweeney, Executive Director, PenMar Development Corp.). In March 1998, several months *after* the LRA's plan already had been submitted and approved, the Army purported to initiate, for the first time, what it contemporaneously described as a public benefit conveyance screening for Fort Ritchie. *Id.* No public notice, however, was ever posted in any post office or published anywhere notifying interested parties, such as RMA, of the initiation of this public benefit conveyance screening.

On August 13, 1998, the Army announced its Record of Decision ("ROD") on the disposal and re-use of Fort Ritchie in the Federal Register, stating that the

final decision "allows the Army to initiate action to dispose of the excess property . . . in accordance with [PenMar's] Fort Ritchie Redevelopment Plan." 63 Fed. Reg. 43383 (Aug. 13, 1998). Thus, the Property was to be conveyed to PenMar pursuant to a redevelopment plan that had been submitted and approved *before* the conduct of the required public benefit screening process.

RMA never received any notice of the availability of the Property for a public benefit conveyance or of the initiation of any purported screening for such a conveyance. Nor was RMA ever notified directly, by letter or otherwise, of the conduct of that screening. JA 47-48 (Alexander Decl. ¶¶ 13-16).[4]

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[4] As Dr. Alexander attested, when he specifically asked PenMar about the conduct of such a screening, he was told that "the screening process for the educational conveyance provisions was not required at Fort Ritchie." JA 47 (Alexander Decl. ¶ 13). As Dr. Alexander also attested below, on information and belief, the LRA similarly misrepresented to the Department of Education itself that "there were no interested parties, despite RMA's prior written and in-person communications to PenMar, its predecessor, and the Army concerning RMA's interest in use of the property for its program." JA 48 (Alexander Decl. ¶ 16). RMA did not learn that a purported public benefit screening process had been conducted until after it executed a costly sublease with PenMar. JA 47 (Alexander Decl. ¶ 14). After learning this, RMA requested that the Army investigate how the screening was handled and reopen the screening process to allow RMA to submit an application for a public benefit conveyance. JA 51 (Alexander Decl. ¶ 28). Those requests were denied.

D. Commencement Of The Civil Action And The Decisions In *Role Models I* and *Role Models II*

After exhausting all administrative avenues of relief, RMA brought suit in the district court seeking declaratory and injunctive relief under the BCA and the Administrative Procedures Act, 5 U.S.C. § 702, and also moved for preliminary injunctive relief to enjoin the conveyance of Fort Ritchie to PenMar. On January 14, 2002, the district court issued its decision in *Role Models I*, denying RMA's motions for a temporary restraining order and preliminary injunction. PA 67a. RMA appealed.

On February 3, 2003, the D.C. Circuit issued its decision in *Role Models II*, concluding that the Government had "violated applicable statutory and regulatory requirements" by failing to give notice of the availability of the Property to potential public benefit conveyees. PA 55a. The D.C. Circuit reversed and remanded, instructing the district court to enter a permanent injunction against conveyance of the Property to PenMar until the Government remedied the defects in the screening process. *Id.*

In elucidating the statutory requirements for the screening process, the D.C. Circuit explained: "[A]fter the LRA publishes the required notice, the process bifurcates: notices of interest submitted by representatives of the homeless and those submitted by FPASAC-eligible parties and other interested parties are considered on separate, parallel tracks." PA 56a. The screening for homeless assistance purposes proceeds on one track. "Meanwhile, on the other

track, the Secretary of Defense evaluates notices of interest submitted by FPASA-eligible parties . . this process occurs before the LRA submits its plan to the HUD Secretary." PA 56a-57a. Only "after completion of the two parallel processes" can the Secretary of Defense consider disposing of the base property. PA 57a. The plain meaning of these statements is that the two screening processes must occur at the same time. Indeed, a May 8, 2006 email from Thomas E. Ledarle, Branch Chief of the Base Realignment and Closure Office, confirms that "[s]creening for homeless initiatives and PBCs [Public Benefit Conveyances] must be conducted concurrently (at the same time)." JA 602.

E. The Second Defective Screening Process, And Subsequent Events Leading To RMA's Second Appeal

On remand, the Government again failed to follow the proper procedures for parallel screening for homeless purposes and for public benefit conveyances. On March 8, 2003, the Government advertised for both homeless initiatives and public benefit conveyances in the local newspaper, stating in pertinent part:

> "SUPPLEMENTAL INFORMATION: This surplus property is available under the provisions of the Federal Property and Administrative Services Act of 1949 and the Base Closure Community Redevelopment and Homeless Assistance Act of 1994. *Notice of interest from representatives of the homeless and other interested parties . . . .*"

JA 165 (emphasis added).

The Government later retracted the ad, thereby excluding homeless initiatives, and re-advertised in October 2003, stating in pertinent part:

> "In accordance with the Federal Register notice of October 3, 2003 (68 FR 57436), the property available for surplus is not being screened for potential homeless use as determined by the U.S. Department of Housing and Urban Development . . . ."

JA 164.

RMA submitted its application for a no-cost public benefit conveyance of the Property, which the Department of Education subsequently denied. PA 4a.

On October 15, 2004, the Government moved to dismiss, alleging that all procedural deficiencies had been cured. PA 13a. On May 18, 2005, the district court denied the motion, concluding that although the Government had conducted the additional public-benefit conveyance screening, it did not do so before it submitted the redevelopment plan to HUD as required by statute. PA 51a. As a result, the Government remained enjoined from conveying the Property to PenMar. PA 52a.

Thereafter, PenMar provided HUD with certain "supplemental information," including the "Fort Ritchie Development Plan, dated October 25, 2004" as an "addendum" to the original 1997 Redevelopment Plan. JA 282-330, 354-356 (Declaration of Patricia Carlile ¶¶ 6, 7). However, instead of also updating the screening for homeless assistance pur-

poses before submitting their redevelopment plan to HUD, the Government relied on the outdated homeless screening process that had taken place almost ten years earlier, in 1996. JA 349.

On October 24, 2005, HUD indicated that it intended to approve the Government's redevelopment plan, claiming it had no authority under the statute or regulations to "redo a homeless screening process once it has been completed." JA 349. RMA protested to HUD Secretary Alphonso Jackson, explaining that the process followed by HUD and the Government failed to comply with the requirements of the Base Closure Act and the procedures outlined in the D.C. Circuit's 2003 opinion. JA 350-353. That effort was unavailing.

On January 1, 2006, RMA amended its complaint as of right, pursuant to Federal Rule of Civil Procedure 15(a), to add allegations concerning the Government's numerous post-remand violations of applicable law, including the failure to conduct a screening for homeless purposes contemporaneously with the public benefit conveyance screening. PA 5a. On February 17, 2006, the Government moved to dismiss for lack of standing. PA 14a.

On September 28, 2006, over 3 1/2 years after the D.C. Circuit remanded the case, the district court issued its decision in *Role Models IV*, granting the Government's motion. PA 28a. RMA appealed.

F. The D.C. Circuit's Second Decision And Denial Of Rehearing

The Government filed a motion for summary affirmance, which the D.C. Circuit denied on March 30, 2007. On February 5, 2008, the D.C. Circuit issued its decision in *Role Models V*, affirming the district court's dismissal, but on other grounds. Stating that the question whether RMA had standing as a homeless provider "seems to us beside the point," the court affirmed, holding that under the "mandate rule," the district court had no authority to order a re-screening for homeless providers. PA 6a.

RMA's subsequent petition for rehearing and rehearing en banc was denied on April 11, 2008. PA 94a.

REASONS FOR GRANTING THE PETITION

The lower courts misapplied the mandate rule in a manner that conflicts with well-established precedents of this Court and RMA's rights, and contravenes the carefully crafted requirements of the Base Closure Act, including the requirement of contemporaneous parallel screenings for potential conveyance of the property for the benefit of the homeless and for other public benefit uses. As a consequence of this error, important questions of federal law concerning the administration of the base closure laws that were properly raised in this case were never adjudicated.

The "mandate rule" is simply the principle that an appellate mandate binds a lower court on remand. This Court's precedents and other authority establish beyond peradventure that the rule applies only

to issues that were actually decided on a previous appeal. The rule cannot legitimately be used to preclude consideration of new issues arising after the remand or to bar adjudication of claims properly raised in conformity with the Federal Rules of Civil Procedure by litigants with standing to raise them. But that is precisely what happened here: The mandate rule was erroneously applied to bar adjudication of claims and issues that could not have been part of the D.C. Circuit's mandate in *Role Models II* because they arose only *after* that decision.

The Court's intervention is warranted to ensure that the Government complies with the procedures mandated by the applicable statutory and regulatory regime in distributing valuable surplus military property under the Base Closure Act, and that RMA is not unlawfully and unjustly deprived of the right to a ruling on the merits of its properly raised claims.

For these reasons, the petition should be granted.

A. The Court's Intervention Is Warranted Because The Decision Below Incorrectly Applied The Mandate Rule In A Manner That Conflicts With Applicable Decisions Of This Court To Bar Adjudication Of An Important Question Of Federal Law.

In its decision in *Role Models IV*, the district court dismissed the case for lack of standing, holding, *inter alia*, that the D.C. Circuit had ruled in *Role Models II* that RMA "is not a homeless provider." PA 19a. In *Role Models V*, the D.C. Circuit stated that its decision in *Role Models II* "made clear that we were

remanding only for the rescreening of other interested parties" and that "[t]he district court had no power or authority to deviate from the mandate this court issued in *Role Models II*." PA 6a (internal quotation marks and citation omitted). The lower courts misapplied the mandate rule to bar adjudication of an important question of federal law concerning the proper administration of the Base Closure Act.

1. The mandate rule applies only to issues actually decided in the previous appeal.

The mandate rule applies only to issues that were actually decided on a previous appeal. *Quern v. Jordan*, 440 U.S. 332, 348 n.18 (1979) ("While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues.") (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1938)). This Court's precedents and other authority hold that the mandate rule cannot legitimately be used to preclude consideration of new issues arising after the remand. *See, e.g., Sprague*, 307 U.S. at 168 (holding that mandate rule does not apply as to matters "not directly in issue in the original proceedings"); 18B C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE & PROCEDURE § 4478.3 ("Wright & Miller") (2008) ("The reach of the mandate is generally limited to matters actually decided. A mere recital of matters assumed for purposes of decision and dicta are not part of the mandate. Matters simply not considered also are likely to be outside the mandate.").

None of the relief sought by RMA in its amended complaint was in any way inconsistent with the D.C. Circuit's 2003 decision in *Role Models II*. That decision did not limit the scope or manner of the screening process that the Government would be bound to follow upon remand; nor did it hold that simultaneous screening would not be required. The court certainly did not hold that the Government could rectify one defect in the process, only to introduce new defects.

The district court stated that the D.C. Circuit "previously ruled . . . that the plaintiff is not a homeless provider," PA 19a, and that RMA's position that it could submit a notice of interest to use the Property for homeless purposes was "contrary to the unequivocal declarations of the D.C. Circuit and this court," PA 11a n.3. The D.C. Circuit, however, made no such findings and did not "unequivocally" state that RMA could not submit a notice of interest as a "representative of the homeless" to obtain surplus property to benefit the homeless, or could not have submitted dual applications for homeless purposes and a public benefit conveyance had it had notice of the availability of the Property for both purposes. In fact, the D.C. Circuit did not even find that the previous notice to homeless providers was adequate; it simply stated that this was the Government's argument, and that the argument was irrelevant to the question whether RMA was provided proper notice for screening for public benefit conveyances.

Because the mandate rule applies only to "matters within its compass," *Quern*, 440 U.S. at 348

n.18, the rule cannot apply to defects in the screening process that arose *after* the D.C. Circuit's decision remanding the case, since those defects could not have been the subject of the court's earlier ruling. *See* Wright & Miller, *supra*; *United States v. Lee*, 358 F.3d 315, 323-24 (5th Cir. 2004) (holding that even under strict formulation of mandate rule used in sentencing appeals in Fifth Circuit, mandate did not preclude consideration of issues "that could *not* have been raised in the initial appeal"). Although *Lee* was a criminal case, the Fifth Circuit's explanation of why a remand cannot foreclose consideration of a new issue is persuasive here. As the Fifth Circuit reasoned, appellate decision-making would grind to a halt if parties were required to address in their briefs "every possible contingency that may make such issues germane at a later stage of the proceeding." 358 F.3d at 324. The accepted, and far more efficient, practice is for parties to remain free to raise new issues as they arise – particularly when those new issues arise along with injuries that had not occurred at the time of an earlier mandate and remand.

2. The mandate rule does not bar adjudication of new claims and issues arising after remand.

In remanding the case in 2003, the D.C. Circuit ordered the Government to remedy the defects in its screening process; it did not and could not authorize the Government to violate the base closure laws anew on remand. But that is precisely what the Government did. As its amended complaint makes clear, RMA sought redress in respect of subsequent

violations of the required procedures that took place *after* remand, including the failure to screen for homeless purposes and public benefit conveyances simultaneously. These subsequent violations were intimately tied to the ongoing case but obviously could not have been raised earlier.

RMA's post-remand amended complaint was properly filed as a matter of right. *See* Fed. R. Civ. P. 15(a) (allowing amendment in advance of responsive pleading). The Government had not yet filed an answer in the case. Nor did the Government object to the amended complaint or argue that the amendment so changed the theory of relief as to require the filing of a separate action. Even if the Government had objected, the amendment would have been proper. *See City of Tenakee Springs v. Clough*, 750 F. Supp. 1406, 1411 (D. Alaska) *rev'd on other grounds*, 915 F.2d 1308 (1990) (allowing amended complaint to encompass claim for relief in APA case against U.S. Forest Service, where additional governmental action during case fostered new claims; holding that amendment was proper whether considered under Rule 15(a) or Rule 15(d)); *see also William Ingliss & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1981) ("The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as possi-

ble by allowing the addition of claims which arise after the initial pleadings are filed.").[5]

So too, RMA's amended complaint was fully consistent with the Court's longstanding precedents concerning the mandate rule. This Court's cases have held that, unless the appellate court directs otherwise, a party may add new claims after remand if doing so would otherwise be consistent with the Federal Rules. *See Rogers v. Hill*, 289 U.S. 582, 587-88 (1933) ("The mandate would not prevent the District Court in the exercise of a sound discretion from allowing plaintiff, were adequate showing made, to file additional pleadings, vary or expand the issues, and take other proceedings to enforce the accounting sought by his bills of complaint."); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 259 (1895) (noting that lower court could "allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties" after remand). Here, neither the district court nor the court of appeals questioned the propriety of RMA's amendments to its complaint.

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[5] Rule 15(d) of the Federal Rules of Civil Procedure allows supplemental pleadings to set out "any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. As RMA was entitled to amend its complaint as or right under Rule 15(a), there was no need to proceed via Rule 15(d). In all events, absent any objection, the distinction is immaterial. *See Tenakee Springs*, 750 F. Supp. at 111 n.5; 6C Wright & Miller § 1473.

Yet the D.C. Circuit inexplicably applied the mandate rule to preclude the new issues squarely raised by RMA in its amended complaint, stating that "Role Models cannot receive a rescreening for homeless providers because the district court had no authority [under the mandate of *Role Models II*] to issue such a remedy." PA 6a. In other words, the court of appeals ruled that RMA was allowed to sue the Government based only on one set of claims – those that existed prior to its decision in *Role Models II* – regardless of what the Government did thereafter. The "rescreening" issue, however, could not have been precluded by the 2003 mandate. In *Role Models I* and *II*, the issue before the courts was the adequacy of the Government's public benefit screening notice. After remand, new issues arose, including the Government's failure to update its 1996 homeless provider screening to satisfy the requirements of the BCA and FPAS.

Simply put, the mandate rule cannot sensibly be read so broadly as to prevent a court from considering claims of violations that arose only after – or even because of – a previous mandate. The rule does not give the party who loses on appeal a free hand to further injure a successful appellant – and then to claim that the appellant has no right to redress that injury because there already has been an appeal in the same case. But that is essentially the result the court of appeals has blessed here.

The D.C. Circuit's application of the mandate rule to preclude adjudication of RMA's claims of new violations of the required screening procedures *after*

Role Models II not only misapplies the mandate rule, but contravenes RMA's due process rights: The decision had the same effect as would a ruling barring RMA from bringing any claim against the Government going forward, thereby violating RMA's right to "a full and fair opportunity to litigate" on its "day in court." *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996)). Courts are not allowed to short-circuit the judicial process in this manner – at least in the absence of a repeated abuse of process – and then only with safeguards to allow potentially meritorious claims. *See, e.g., Martin v. District of Columbia Court of Appeals*, 506 U.S. 1, 2 (1992) (*per curiam*) (forbidding future filings by "notorious abuser" of Supreme Court process). The amended complaint was properly filed and RMA was entitled to a ruling on the new claims raised therein.[6]

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[6] The D.C. Circuit pointedly did not rule on whether RMA had standing to seek redress for the Government's failure to re-screen for homeless purposes after remand. *See* PA 6 (stating that the standing issue was "beside the point"). While the district court purported to make a standing ruling, the court conflated the issues of standing and law of the case, holding, essentially, that RMA lacked standing because the D.C. Circuit's mandate in *Role Models II* did not expressly provide for re-screening for homeless purposes. PA 20a. Despite the district court's mandate-related qualms, RMA clearly has established its standing at the pleading stage. As the district court noted, RMA alleged that it provided services to the homeless and that the Government's failure to conduct a full re-screening after *Role Models II* prevented RMA from applying to use the Property *both* as an "other interested part[y]" and as a party provid-

3. The D.C. Circuit's erroneous application of the mandate rule improperly precluded adjudication of an important question of federal law.

The proper screening procedure to be used in disposing of surplus military-base property lies at the heart of RMA's claims in this case. It is an issue with great significance for the administration of the base closure laws, with far-reaching effects on any organization that applies for a conveyance of surplus base property and on the public interest.

As discussed above, the BCA and its implementing regulations clearly require a single time period during which parallel screenings for homeless purposes and public benefit conveyances are to be conducted, *not* two separate time periods seven years apart. Public policy and the purposes of the base closure laws support this interpretation of the screening requirements: The whole purpose of the screening process is to ensure that in developing a redevelopment plan, the needs of the homeless and other uses

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ing or proposing to provide services to the homeless. PA 19a. Whether RMA had such a right is what this case is about. A plaintiff need only show at the pleading stage that it has "asserted" an injury "*arguably* . . . within the zone of interests protected or regulated by the statute . . . in question." *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998) (internal quotation marks omitted) (emphasis added). Here, whether or not RMA eventually will be able to demonstrate that its rights were abridged, it has "asserted" an injury that is at least "arguably" redressable through the present suit. RMA need not, of course, demonstrate that it will win in order to show standing.

of base closure property for public benefit conveyances are fully considered and accounted for, and this can only be done if the processes are conducted at the same time.

In this case, the needs of the homeless were not considered when public benefit screening was conducted in 2003, and public benefit uses were not considered when the homeless screening was conducted in 1996. It is inconceivable that the needs of the homeless in 2005, when the redevelopment plan was submitted to HUD, could be considered based on a screening process that took place almost ten years earlier. The purpose of the statute requires simultaneous, parallel screening processes, not a piecemeal, fragmented process. It would have been a simple matter for the Government and the LRA to conduct an updated homeless screening process in 2003, after remand, at the same time as the screening for public benefit conveyances. This plainly did not occur.

The Government failed to comply with the court of appeals' mandate to correct the procedural errors in the screening process and failed to conduct a proper screening process on remand. The issues arising from the Government's post-remand violations are of critical public importance because they affect the disposition of valuable base closure property, which in this case was awarded to private, commercial interests instead of being used for homeless and public purposes in accordance with the statute. The court of appeals' misuse of the mandate rule not only deprives RMA of "a full and fair opportunity to litigate," *Taylor* 128 S. Ct. at 2171, but also denies the

public a clarification of an important and under-examined federal statute involving the disposition of valuable surplus military property. The Court's intervention is warranted to ensure that these issues are fully and fairly litigated to conclusion.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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Dated: July 10, 2008

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED FEBRUARY 5, 2008

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 06-5294

ROLE MODELS AMERICA, INC.,

Appellant

v.

PETE GEREN, Secretary of the Army and
Margaret Spellings, Secretary of Education,

Appellees.

Argued Dec. 7, 2007
Decided Feb. 5, 2008
Rehearing En Banc Denied April 11, 2008.

Before: RANDOLPH, GRIFFITH and KAVANAUGH, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

Role Models America, Inc. brought suit under the Defense Base Closure and Realignment Act of 1990, 104 Stat. 1808 (codified as amended at 10 U.S.C. § 2687

note),[1] the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.*, to enjoin the Secretary of the Army from conveying Fort Ritchie, a former military base, to PenMar Development Corporation of Maryland. The district court dismissed Role Models' claims for lack of standing. We affirm, but on different grounds with respect to the Base Closure Act.

I.

The Base Closure Act outlines a procedure for closing and realigning military bases within the United States. Base Closure Act § 2901(b). Unless the Secretary of Defense determines that another federal agency or department can use the military installation chosen for closure, the Secretary must publish notice that the surplus property exists. Base Closure Act § 2905(b)(5)(A), (b)(7)(B)(i)(IV). Within thirty days of the notice's publication, the local redevelopment authority, an entity established by state or local government and recognized by the Secretary of Defense, must publish a notice stating the period within which it will entertain statements of interest from "representatives of the homeless and other interested parties." 24 C.F.R. § 586.20(c)(1); 32 C.F.R. § 176.20(c)(1). After the notice is published, the homeless provider and "other interested party" applications are reviewed separately. Base Closure Act § 2905(b)(7)(K)(v), (b)(7)(F). The

1. All following citations to the Base Closure Act are to the Act as it appears in note following 10 U.S.C. § 2687.

Secretary of Defense determines if any "other interested parties" are eligible for a public benefit conveyance, Base Closure Act § 2905(b)(7)(K)(v), while the redevelopment authority reviews the homeless provider submissions. Base Closure Act § 2905(b)(7)(F). The redevelopment authority may then submit its own redevelopment plan to the Secretary of Housing and Urban Development for approval. Base Closure Act § 2905(b)(7)(F).

Fort Ritchie is a former United States Army base located in western Maryland and is home to the Camp Ritchie Historic District, a National Register-eligible historic district. The fort was selected for closure in 1995. *See* Notice of Recommended Base Closures and Realignments, 60 Fed. Reg. 11,414, 11,436 (Mar. 1, 1995) (Secretary of Defense recommending closure of the base); President's Message to Congress Transmitting Recommendations of the Defense Base Closure and Realignment Commission, H.R. Doc. No. 104-96, at 1 (1995) (President accepting recommendation). In response, the Maryland General Assembly created PenMar to serve as the redevelopment authority responsible for developing the Fort Ritchie property.

Role Models is a non-profit Maryland corporation seeking to use the Fort Ritchie property as an educational institution for out-of-school youth. Role Models first brought suit against the Secretary of the Army and the Secretary of Education to enjoin the conveyance of Fort Ritchie from the Army to PenMar in July 2001. *Role Models Am., Inc. v. White*, 193 F.Supp.2d

76, 77 (D.D.C.2002) ("*Role Models I*"). Role Models failed to acquire the Fort Ritchie property through the application process, and alleged that the defendants violated Base Closure Act notification and screening procedures and the APA. *Id.* at 79. The district court denied Role Models' motions for a temporary restraining order and a preliminary injunction. *Id.* at 77.

On appeal, this court held that the defendants had not given proper notice with respect to the Fort Ritchie property. *Role Models Am., Inc. v. White*, 317 F.3d 327, 333 (D.C.Cir.2003) ("*Role Models II*"). The court stated that it "cannot imagine how Role Models, an organization devoted to establishing schools for at-risk minors, could possibly have interpreted a notice entitled 'Homeless Assistance Outreach Initiative' as an invitation to apply for the Fort Ritchie property," and concluded that the notice was insufficient notification for "other interested parties" as the law requires. *Id.* at 332. The court remanded the case, directing the district court to issue a permanent injunction against the conveyance until the defendants remedied the procedural error. *Id.* at 333-34. To comply with this order, the defendants published a notice in October 2003 for "other interested parties" to consider applying for the Fort Ritchie property. Role Models then applied for a no-cost public benefit conveyance. The Department of Education denied the application.

In October 2004, the defendants claimed that they had remedied the procedural error and moved to dismiss the complaint. The district court denied their motion

because the Department of Housing and Urban Development approved PenMar's redevelopment plan before the remedial screening was complete. In order to remedy that procedural error, PenMar then sent HUD a revised proposal and HUD accepted it.

In November 2005, defendants again moved to dismiss. Before the district court ruled on the motion to dismiss, Role Models amended its complaint to claim, *inter alia*, that it is a homeless provider and that the defendants violated the Base Closure Act by failing simultaneously to screen for homeless providers when issuing the remedial notices for "other interested parties" in 2003. In addition, Role Models included the allegation that the defendants' conveyance of Fort Ritchie violated the Preservation Act because it failed to take into account the impact of the transfer on historic properties. In 2006, the district court granted the defendants' motion to dismiss, holding that Role Models' claims were barred by this court's rulings and that Role Models lacked standing to bring its APA, Base Closure Act, and Preservation Act claims.

II.

Role Models claims that the defendants violated the Base Closure Act by failing to re-screen for homeless providers when, on remand, they screened for "other interested parties." The district court held that Role Models lacked standing to bring this claim because it was not a homeless provider.

Whether Role Models is a homeless provider under the Base Closure Act, *see* 24 C.F.R. § 586.5, seems to us beside the point. In our earlier opinion, we noted that Role Models filed suit "[c]laiming that it was entitled to a public benefit conveyance screening regarding the Fort Ritchie property" because the defendants did not screen for "other interested parties." *Role Models II*, 317 F.3d at 331. We explained, "[i]f the Secretary of Defense determines that an 'other interested' applicant meets the eligibility standards . . . the Secretary effects a 'public benefit conveyance' of the requested property to that party," *id.* at 329, and concluded that the failure to publish notice for other interested parties "prevented Role Models from triggering a public benefit conveyance screening." *Id.* at 333. Our opinion made clear that we were remanding only for the rescreening of other interested parties.

The district court had no "power or authority to deviate from the mandate" this court issued in *Role Models II*. *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948). The mandate rule is a " 'more powerful version' of the law-of-the-case doctrine, which prevents courts from reconsidering issues that have already been decided in the same case." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 597 (D.C.Cir.2001). In light of our earlier decision, Role Models cannot receive a rescreening for homeless providers because the district court had no authority to issue such a remedy.

Appendix A

III.

Role Models claims the defendants violated the Historic Preservation Act by failing to consider the effects of the property transfer on the Fort Ritchie historic district. 16 U.S.C. § 470f. The district court held that Role Models is not within the zone of interests protected by the Preservation Act and therefore lacked prudential standing to bring this claim. *See Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). This strikes us as correct.

The Preservation Act was enacted to "encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment." 16 U.S.C. § 470-1(5). Role Models does not allege that the purpose of its organization is related to preserving historic sites like Fort Ritchie. Role Models seeks to acquire Fort Ritchie to use it as an educational facility for at-risk youth. The Preservation Act does not protect Role Models' right to acquire property for its own use when the use is unrelated to the Preservation Act's purpose. *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1039 (8th Cir.2002); *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1157-58 (9th Cir.1998). It follows that Role Models lacked prudential standing to pursue this claim.[2]

Affirmed.

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2. The plaintiff's brief contains several additional arguments that do not merit discussion. We have considered these arguments and have rejected them.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED SEPTEMBER 28, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 01-1595(RMU).

ROLE MODELS AMERICA, INC.,

Plaintiff,

v.

Francis HARVEY, Secretary of the Army,[1] et al.,

Defendants.

Sept. 28, 2006.

MEMORANDUM OPINION

URBINA, District Judge.

GRANTING THE DEFENDANTS' MOTION TO DISMISS

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1. Francis Harvey, as the current Acting Secretary of the Army, is automatically substituted in place of the previous Secretary of the Army, Les Brownlee, as the proper defendant. Fed.R.Civ.P. 25(d)(1).

Appendix B

I. INTRODUCTION

The plaintiff, Role Models America, Inc. ("RMA"), brings suit against the defendants, the Secretary of the Army and the Secretary of the Department of Education, for wrongfully depriving the plaintiff of a fair opportunity to compete for and acquire a surplus military base located at Fort Ritchie ("the Fort Ritchie property"). The plaintiff alleges that the defendants violated the Administrative Procedures Act, 5 U.S.C. § 702 ("APA"), and the Defense Base Closure and Realignment Act, 10 U.S.C. §§ 2901 *et seq.* ("DBCRA"). In particular, the plaintiffs allege that the defendants failed to properly screen parties who were interested in the Fort Ritchie property before committing to convey the property to a state-created development corporation, PenMar Development Corporation ("PenMar"). The plaintiff also claims that PenMar will immediately sell, or "flip," the property to a third party, Corporate Office Properties Trust ("COPT"). Because COPT allegedly plans to build two modern buildings on the site, the plaintiff claims that the Secretary of the Army's ("the Army") proposed conveyance of the Fort Ritchie property to PenMar violates the APA and the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* ("NHPA"). The defendants move to dismiss arguing that the D.C. Circuit's previous rulings in this case bar some of the plaintiff's claims and that the plaintiff lacks standing to bring its remaining claims. Because the plaintiff cannot identify a personal, redressable injury for its APA, DBCRA or NHPA claims

and because the D.C. Circuit's rulings bar some of the plaintiff's claims, the court grants the defendants' motion to dismiss.

II. BACKGROUND

A. Factual History

The court takes a step back to review the protracted procedural history of this case. The case originates on September 8, 1995, when Congress designated the Fort Ritchie property for closure under the Defense Base Realignment and Closure Act ("DBCRA"), 10 U.S.C. § 2901 *et seq.* Am. Compl. ¶¶ 16, 18. After its closure, the Fort Ritchie property became surplus real property available for purchase by third parties under the Federal Property Administrative Services Act ("FPASA"), 40 U.S.C. §§ 101 *et seq.*, and under the DBCRA. Am. Compl. ¶ 18; *Role Models Am. Inc. v. White,* 193 F.Supp.2d 76, 77 (D.D.C.2002) (*"Role Models I"*). The DBCRA creates statutory procedures for the sale of closed bases. Specifically, the DBCRA requires that the Secretary of Defense and a Local Redevelopment Authority ("LRA")[2] conduct a screening for non-commercial uses of the land by issuing a notice of the surplus real property to both (1) representatives of the homeless and (2) "other interested parties." 10 U.S.C. § 2905(b)(7)(f). Once the LRA takes these steps and

2. Local Redevelopment Authorities ("LRAs") are entities "established by State or local government and recognized by the Secretary of Defense." 24 C.F.R. § 586.5.

formulates a redevelopment plan for the property, the LRA may then submit the plan to the Secretary of Housing and Urban Development ("HUD") for approval. *Id.*

The plaintiff, RMA, is a non-profit Maryland corporation seeking to establish a military-style high school for at-risk youth.[3] Mem. Op. (May 18, 2005) *("Role*

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3. The plaintiff amended its complaint to explicitly allege that it is a homeless provider and that the defendants' failure to re-screen for homeless providers in 2003 deprived it of an opportunity to acquire the Fort Ritchie property. Am. Compl. ¶ 80. These assertions are contrary to the unequivocal declarations of the D.C. Circuit and this court. The D.C. Circuit concluded that it could not imagine how RMA "could possibly have interpreted a notice entitled Homeless Assistance Outreach Initiative as an invitation to apply for the Fort Ritchie Property," because RMA is an organization devoted to establishing schools for at-risk minors. *See Role Models Am. Inc. v. White*, 317 F.3d 327, 331 (D.C.Cir.2003) (*Role Models II* at 332). This court also rejected the plaintiff's "obtuse" argument that it is a homeless provider by reminding "the plaintiff that it initially brought suit because, *as an education provider,* it did not receive adequate notice of the availability of the surplus property *because the notice was directed at homeless initiatives."* Mem. Op. (May 18, 2005) (*"Role Models II"*) (emphasis added). The court respects "issues that were decided either explicitly or by necessary implication" in this litigation. *Dept. of Labor v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1041 (D.C.Cir.1997) (quoting *Maggard v. O'Connell*, 703 F.2d 1284, 1289 (D.C.Cir.1983)). To be clear, the plaintiff is not a representative of the homeless, it was not entitled to compete for the property as a homeless provider and it cannot demonstrate that it suffered an injury because of the defendants' failure to conduct a new homeless screening.

Models II") at 2. In 1996, RMA sought to acquire the Fort Ritchie property for the *33 site of its school. Am. Compl. ¶ 3. The plaintiff previously rented the property. *Id.* ¶ 53.

In 1997, the state of Maryland designated PenMar as the LRA for implementing the local redevelopment plan at the Fort Ritchie property. Am. Compl. ¶¶ 25-26. According to the plaintiff, however, PenMar denied it an opportunity to compete for the Fort Ritchie property. *Id.* ¶ 136. On May 10, 2002, the plaintiff filed for Chapter 11 bankruptcy, *id.* ¶ 151, and four days later, the defendants approved PenMar's plan for the Fort Ritchie property and purported to convey the property to PenMar. *Id.* ¶ 118. Subsequently, in 2004, PenMar voted to sign a Purchase and Sale Agreement to sell Fort Ritchie Property to COPT. *Id.* ¶ 60.

B. Procedural History

After an unsuccessful attempt to acquire the Fort Ritchie property in 2001, the plaintiff brought suit asking the court to enjoin the conveyance from the Army to PenMar. *Role Models Am. Inc. v. White*, 317 F.3d 327, 331 (D.C.Cir.2003) ("*Role Models II*"). The plaintiff alleges that the defendants did not follow the required procedures under the DBCRA, thereby depriving the plaintiff of the opportunity to compete for and acquire the Fort Ritchie property. Am. Compl. ¶ 145.

The D.C. Circuit ruled on February 3, 2003 that the defendants' conveyance procedures were defective.

Role Models II, 317 F.3d at 333. Specifically, the D.C. Circuit ruled that the defendants failed to give notice of the availability of the property to potential public benefit conveyees, like the plaintiff. *Id.* The circuit court remanded the case, instructing this court to enter a permanent injunction against the conveyance from the Army to PenMar until the defendants remedied the procedural errors of the screening process. *Id.* at 333-34. In October 2003, the defendants issued remedial notices and conducted a screening of "other interested parties" like RMA who may be eligible to obtain the property. *Role Models III*. The plaintiff submitted its application for a no-cost public benefit conveyance of the property. *Id.* at 14. Defendant Department of Education, however, subsequently denied the plaintiff's application. *Id.*

On October 15, 2004, the defendants moved to dismiss, alleging that they cured all procedural deficiencies as required by the D.C. Circuit. *Id.* at 12-17. The court denied their motion, concluding that although the defendants conducted the additional screening, the defendant did not conduct the screening before it submitted the redevelopment plan to HUD as required by the DBCRA. *Id.* at 16-17. Consequently, the defendants remained enjoined from conveying the property to PenMar. *Id.*

On January 1, 2006, the plaintiff amended its complaint to argue that it is a homeless provider and that PenMar did not properly screen for homeless interests when it issued remedial notices in 2003.

Am. Compl. ¶¶ 80, 85. The amended complaint also alleges that the defendants violated the NHPA by agreeing to convey the property to PenMar. *Id.* ¶¶ 141-145. On February 17, 2006, the defendants moved to dismiss the plaintiff's complaint, claiming that the plaintiff lacks standing to bring its complaint under the APA, the DBCRA, or the NHPA. The court now turns to the defendants' motion to dismiss.

III. ANALYSIS

A. Legal Standard for a Motion to Dismiss Pursuant to Rule 12(b)(1)

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 58 S.Ct. 586, 82 L.Ed. 845 (1938); *see also Gen. Motors Corp. v. Envtl. Prot. Agency*, 363 F.3d 442, 448 (D.C.Cir.2004) (noting that "[a]s a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction").

Because "subject-matter jurisdiction is an 'Art. III as well as a statutory requirement[,] no action of the parties can confer subject-matter jurisdiction upon a federal court.' " *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C.Cir.2003) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)). On a

motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject-matter jurisdiction. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The court may dismiss a complaint for lack of subject-matter jurisdiction only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 343 (D.C.Cir.2003) (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

Because subject-matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States,* 334 F.3d 61, 64, 69 (D.C.Cir.2003); *Grand Lodge of Fraternal Order of Police v. Ashcroft,* 185 F.Supp.2d 9, 13 (D.D.C.2001). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States,* 782 F.2d 227, 241 (D.C.Cir.1986), *vacated on other grounds,* 482 U.S. 64, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C.Cir.1992).

Appendix B

B. The Court Grants the Defendants' Motion to Dismiss

The defendants move to dismiss arguing that the plaintiff lacks standing to bring claims under the DBCRA and the NHPA and because the APA does not confer independent subject-matter jurisdiction. *See generally* Defs.' Mot. The plaintiff counters that it has standing under both the DBCRA and the NHPA because it suffered an injury when it was deprived of the opportunity to compete for and acquire the Fort Ritchie property. Pl.'s Opp'n at 24, 29. Because the plaintiff has neither a cognizable injury-in-fact under the DBCRA nor a redressable injury, and because the plaintiff's alleged injury is not an interest protected by the NHPA, the plaintiff lacks standing to bring its claims.

1. Legal Standard for Standing

Article III of the Constitution limits the jurisdiction of federal courts to cases or controversies. U.S. CONST. ART. III, § 2, cl. 1. These prerequisites reflect the "common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Consequently, "a showing of standing is an essential and unchanging predicate to any exercise of a court's jurisdiction." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C.Cir.1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Appendix B

As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing. *Defenders of Wildlife,* 504 U.S. at 561, 112 S.Ct. 2130; *Steel Co.,* 523 U.S. at 104, 118 S.Ct. 1003; *City of Waukesha v. Envtl. Prot. Agency,* 320 F.3d 228, 233 (D.C.Cir.2003) (per curiam). The extent of the plaintiff's burden varies according to the procedural posture of the case. *Sierra Club v. Envtl. Prot. Agency,* 292 F.3d 895, 898-99 (D.C.Cir.2002). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct will suffice. *Id.* On a motion for summary judgment, however, the "plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts which for purposes of the summary judgment motion will be taken to be true." *Id.* at 899 (citing Federal Rule of Civil Procedure 56); *accord Florida Audubon,* 94 F.3d at 666.

To demonstrate standing, a plaintiff must satisfy a three-pronged test. *Sierra Club,* 292 F.3d at 898 (citing *Defenders of Wildlife,* 504 U.S. at 560, 112 S.Ct. 2130). First, the plaintiff must have suffered an injury in fact, defined as a harm that is concrete and actual or imminent, not conjectural or hypothetical. *Byrd v. Envtl. Prot. Agency,* 174 F.3d 239, 243 (D.C.Cir.1999) (citing *Steel Co.,* 523 U.S. at 103, 118 S.Ct. 1003). Second, the injury must be fairly traceable to the governmental conduct alleged. *Id.* Finally, it must be likely that the requested relief will redress the alleged injury. *Id.* Our court of appeals has made clear that no standing exists if the plaintiff's allegations are "purely speculative[, which is] the ultimate label for injuries too implausible

to support standing." *Tozzi v. Dep't of Health & Human Servs.*, 271 F.3d 301, 307 (D.C.Cir.2001). Nor is there standing where the court "would have to accept a number of very speculative inferences and assumptions in any endeavor to connect the alleged injury with [the challenged conduct]." *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C.Cir.1980).

The test for standing shifts focus when a plaintiff challenges an agency's failure to comply with a procedural requirement. *Florida Audubon*, 94 F.3d at 664 (citing *Defenders of Wildlife*, 504 U.S. at 572 n. 7, 112 S.Ct. 2130). In such cases, as long as the procedural requirement is designed to protect a threatened, concrete interest of the plaintiff, the violation is sufficient to grant the plaintiff standing. *City of Waukesha*, 320 F.3d at 234. To ensure that the plaintiff's interest is more than a general interest common to all members of the public, however, the procedural-rights plaintiff must show "that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest." *Id.* (citing *Florida Audubon*, 94 F.3d at 664).

2. The Plaintiff Lacks Standing to Bring Its DBCRA Claim

The DBCRA requires the LRA to conduct a screening of both homeless providers and "other interested parties" before submitting a redevelopment plan to HUD for approval. *Role Models II*, 317 F.3d at 329. With regard to the screening of homeless providers,

the defendants allege that because the plaintiff is not a homeless provider, the plaintiff could not have suffered any injury when the defendants did not re-screen for homeless interests. Defs.' Mot. at 8-13. The plaintiff contends that it is a homeless provider and that it was denied an opportunity to compete for the property as a result of the defendants' re-screening only for "other interested parties." Am. Compl ¶ 139. The Circuit previously ruled, however, that the plaintiff is not a homeless provider. *Infra*, n. 2. Therefore, the plaintiff can show no redressable injury.

With regard to the screening of "other interested parties," the defendants contend that the plaintiff received actual notice of the remedial screening for other interested parties, indicating the availability of the land, thereby satisfying the defendants' obligation requirement to screen for "other interested parties." Defs.' Mot. at 2-3; Pl.'s Opp'n at 11. The plaintiff argued in a previous complaint that the defendants violated the DBCRA by not properly screening for "other interested parties." *Role Models II*, 317 F.3d at 327. The D.C. Circuit agreed with the plaintiff, identifying the deficiencies in the defendants' procedures and directing them to perfect the screening process. *Id.* at 329-330. The court instructed the defendants to re-conduct a public benefit conveyance screening and accept only HUD-approved LRA redevelopment proposals. *Id.* at 333. The plaintiff does not deny that it received actual notice of the remedial screening for "other interested parties." Indeed, the plaintiff responded to this notice, and its application was rejected. Pl.'s Opp'n at 11.

The plaintiff protests the defendants' failure to *simultaneously* conduct a re-screening for homeless interests and a screening for "other interested parties." Am. Compl. ¶ 139. Because of this alleged failure to conduct these screenings simultaneously, the plaintiff claims that it has still been deprived the opportunity to acquire the Fort Ritchie property.[4] *Id.* In essence, the plaintiff contends that the two screenings had to be done at the same time to comport with the DBCRA requirements and the D.C. Circuit's instructions. *Id.* The D.C. Circuit's instructions on remand, however, did not indicate that the defendants had to complete both processes simultaneously. *Role Models II*, 317 F.3d at 329 (stating that notices of interest from homeless organizations and "other interested parties" are to be considered on "separate, parallel tracks"). Simply put, the Circuit only required the defendants to screen for "other interested parties." *Id.* at 332. It necessarily did not require the defendants to conduct both processes simultaneously. Therefore, the plaintiff cannot demonstrate that the defendants failed to comply with the DBCRA requirements, and it has no standing to pursue its claims. *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.* 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (holding that the injury must be fairly traceable to the challenged action to be redressable by the court).

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4. As stated in the previous paragraph, however, the plaintiff received notice of the public conveyance screening and, in fact, submitted an application. *Role Models III* at 14. The plaintiff, therefore, had an opportunity to compete for the Fort Ritchie property as an "other interested party."

3. The Plaintiff Lacks Standing to Bring Its NHPA Claim

The plaintiff also claims that the defendants' proposed conveyance of the Fort Ritchie property to PenMar violates the NHPA. Am. Compl. at 65. The plaintiff contends that the defendants violated the NHPA by contracting to convey the property to PenMar after knowing that PenMar had previously contracted to "flip" the land to COPT with plans to build two large buildings on one of the Fort Ritchie property's historic fields. Am. Compl. ¶¶ 121, 125, 159-160. The plaintiff argues that during the period in which the plaintiff previously rented the Fort Ritchie property from PenMar, PenMar used the NHPA strategically to benefit itself and harm the plaintiff. Am. Compl. ¶ 127. Specifically, in February 2001, PenMar sued the plaintiff in Maryland State Court for placing two flags and flagpoles on the property which, PenMar argued, violated the NHPA. *Id.* ¶ 128. The defendants challenge the plaintiff's arguments by alleging that the plaintiff lacks standing to bring these claims under the NHPA because of its failure to "connect the alleged violations to any injury that it is suffering or will suffer or any interest that it has." Defs.' Mot. at 15.

a. Legal Standard for Judicial Review of Agency Actions

NHPA claims are reviewed pursuant to the APA. *Nat'l Trust for Historic Pres. v. Blanck*, 938 F.Supp. 908 (D.D.C.1996). The APA entitles "a person suffering

legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . to judicial review thereof." 5 U.S.C. § 702. Under the APA, a reviewing court must set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706; *Tourus Records, Inc. v. Drug Enforcement Admin.*, 259 F.3d 731, 736 (D.C.Cir.2001). In making this inquiry, the reviewing court "must consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (internal quotations omitted). At a minimum, the agency must have considered relevant data and articulated an explanation establishing a "rational connection between the facts found and the choice made." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986); *Tourus Records*, 259 F.3d at 736. An agency action usually is arbitrary or capricious if

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443

(1983); *see also County of L.A. v. Shalala*, 192 F.3d 1005, 1021 (D.C.Cir.1999) (stating that "[w]here the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [the court] must undo its action").

As the Supreme Court has explained, however, "the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Veh. Mfrs. Ass'n*, 463 U.S. at 43, 103 S.Ct. 2856. Rather, the agency action under review is "entitled to a presumption of regularity." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

b. The Plaintiff Lacks Standing to Bring its APA Claims

To bring suit under the APA, the plaintiff must demonstrate not only that it has suffered a redressable injury that is fairly traceable to the defendant's conduct, but also that the injury is within the zone of interests protected by the NHPA. *Pye v. United States*, 269 F.3d 459, 466 (4th Cir.2001) (internal citations omitted). Here, however, the plaintiff's primary alleged injury is the denial of an opportunity to acquire the Fort Ritchie property. Am. Compl. ¶ 161. As a remedy, the plaintiff asks the court to convey the land directly to RMA, to award the plaintiff the estimated value of the land or to require the defendants to reopen the screening process. *Id.* ¶ 163.

Appendix B

The purpose of the NHPA is to preserve historic sites for public use. 16 U.S.C. §§ 470-1(4)-(5); *Mont. Wilderness Ass'n v. Fry*, 310 F.Supp.2d 1127, 1151 (D.Mont.2004). A party dedicated to preserving such resources has standing to sue under the statute. *Pres. Coal. of Erie County v. Fed. Transit Admin.*, 129 F.Supp.2d 551, 561 (W.D.N.Y.2000). The plaintiff, however, is dedicated to providing education to at-risk youth and seeks only to preserve its opportunity to obtain the Fort Ritchie property under the DBCRA. *See generally* Am. Compl. The NHPA does not protect the right to acquire property, and this relief consequently is not within the zone of interest protected by the statute. *Ass'n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (stating that the interest sought to be protected by the complaint has to be within the zone of interest to be protected or regulated by the statute in question); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1039 (8th Cir.2002) (holding that the plaintiff did not have standing because it was not able to demonstrate how its economic interests fell within the zone of interests protected by the NHPA); *Pye*, 269 F.3d at 467-468 (stating that the plaintiffs had standing because they demonstrated a concrete injury and were suing to preserve a historic cemetery adjacent to their land); *Lemon v. Harvey*, 448 F.Supp.2d 97, __, 2006 WL 2465710, at *7 (D.D.C. Aug. 25, 2006) (stating that neighbors to the Fort Ritchie property lacked standing to bring NHPA challenges to the conveyance of the property for commercial development). Because the plaintiff's alleged injury is not an interest protected by

the NHPA, the court grants the defendants' motion to dismiss the plaintiff's NHPA claims for lack of standing.[5]

4. The Plaintiff's Bankruptcy Petition Does Not Affect the Status of the Conveyance of the Fort Ritchie Property to PenMar

In an attempt to demonstrate injury, the plaintiff argues that the defendants' approval of PenMar's conveyance application violated the plaintiff's petition for Chapter 11 bankruptcy. Am. Compl. ¶ 117. Specifically, the plaintiff contends that an automatic stay provision which protects a debtor's estate against claims by his creditors should apply to the Fort Ritchie property when the plaintiff filed for Chapter 11 bankruptcy protection. *Id.* ¶ 151 (citing 11 U.S.C. § 362). The plaintiff asks the court to nullify the defendants' approval of the conveyance to PenMar because the Army moved to transfer the property while this case was on appeal and because the approval took place after the plaintiff filed suit to recover $1.8 million in unwarranted

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5. The plaintiff also brings its challenges to the alleged commercial development plans by citing various preservation agreements to which the defendants are bound. The plaintiff discusses, for example, a community development plan, Am. Compl. ¶ 60, a Programmatic Agreement with the Maryland State Historic Preservation Officer, *id.* ¶ 121, and Design Guidelines, *id.* ¶ 125. The plaintiff is not a party to any of these agreements, nor does it purport to be. It, therefore, lacks standing to sue to enforce these agreements. *See Lemon v. Harvey*, 448 F.Supp.2d 97, 105-06, 2006 WL 2465710 at *7 (D.D.C.2006).

lease payments for the Fort Ritchie property. Pl.'s Opp.'n at 28. The defendants assert that an automatic stay does not preclude the conveyance because the Fort Ritchie property did not belong to the plaintiff. Defs.' Mot. at 15.

Three provisions of 11 U.S.C. § 362 provide for an automatic stay for claims against a debtor's property or estate when the debtor files a petition for Chapter 11 bankruptcy relief. 11 U.S.C. § 362 (stating that a stay applies to "any act to obtain possession of property of the estate or of property from the estate or exercise control over property of the estate," "any act to create, perfect or enforce any lien against the property of the estate," and "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title"). The statute is intended to give debtors "a breathing spell" from creditors and to stop all collection and foreclosure actions against them. *In re Javens*, 107 F.3d 359, 363 (6th Cir.1997).

The plaintiff alleges injury because it had previously leased the Fort Ritchie property, the property was part of the plaintiff's estate for purposes of 11 U.S.C. § 362, and the Army violated the automatic stay by conveying the property to PenMar. Pl.'s Opp.'n at 27. The statute however, explicitly excludes a debtor's interest in the lease of nonresidential property if the lease had expired or was terminated before the commencement of the case. 11 U.S.C. § 541(b)(2). Although the plaintiff previously leased the Fort Ritchie property, PenMar evicted the plaintiff from the property in April 2001. Am. Compl.

¶ 53. That eviction terminated the plaintiff's interest in the property. *Robinson v. Chicago Housing Auth.*, 54 F.3d 316, 318-19 (7th Cir.1995) (stating that any method that fully severs the rights of the tenant in the property renders the lease expired). Only after PenMar evicted the plaintiff did the plaintiff file for bankruptcy in May 2002. *Id.* ¶ 151. Because the plaintiff's interest in the property terminated prior to the plaintiff's filing for bankruptcy, the automatic stay provision does not apply. *In re Pettit*, 217 F.3d 1072, 1081 (9th Cir.2000) (holding that if property is not part of the individual's estate at the time he files a bankruptcy petition, no automatic stay provision applies to the property).

The plaintiff also argues that it is entitled to an automatic stay because it was trying to recover a rent claim against the defendant. Pl.'s Opp.'n at 28. Section 362, however, only applies to claims made by creditors against debtors (here, the plaintiff) and it does not address actions brought by the debtor which would inure to the benefit of the bankrupt estate. *Carley Capital Group v. Fireman's Fund Ins. Co.*, 889 F.2d 1126, 1127 (D.C.Cir.1989) (quoting *Assoc. of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir.1982)). Here, however, PenMar is not trying to collect a claim against the plaintiff. On the contrary, the plaintiff is trying to recover a rent claim against PenMar. Pl.'s Opp.'n at 28. Therefore, the automatic stay provision has no effect on the conveyance of Fort Ritchie. Accordingly, the plaintiff has alleged no injury and lacks standing to bring its claim.

Appendix B

IV. CONCLUSION

For the foregoing reasons, the court grants the defendants' motion to dismiss. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 28th day of September, 2006.

APPENDIX C — MEMORANDUM OPINION DENYING THE PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY AND DENYING THE DEFENDANTS' MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FILED MAY 18, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 01-1595 (RMU), Doc. Nos.: 29, 38

2005 U.S. Dist. LEXIS 23513

ROLE MODELS AMERICA, INC., Plaintiff, v. LES BROWNLEE, Secretary of the Army,[1] et al.,

Defendants.

2005 U.S. Dist. LEXIS 23513

May 18, 2005, Decided
May 18, 2005, Filed

MEMORANDUM OPINION DENYING THE PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY AND DENYING THE DEFENDANTS' MOTION TO DISMISS

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1. Les Brownlee, as the current Acting Secretary of the Army, is automatically substituted in place of the previous Secretary of the Army, Thomas White, as the proper defendant. FED.R. CIV.P.25(d)(1).

Appendix C

I. INTRODUCTION

This matter comes before the court on Les Brownlee's, Acting Secretary of the Army, and Roderick R. Paige's, Secretary of the Department of Education, (collectively, the "defendants") motion to dismiss for lack of subject matter jurisdiction. On July 24, 2001, the plaintiff, a non-profit corporation, filed motions for a temporary restraining order and preliminary injunction against the defendants in their official capacities, alleging that they violated the Defense Base Closure and Realignment Act of 1990, as amended 10 U.S.C. § 2687 note ("DBCRA"), and the Administrative Procedure Act ("APA"). The plaintiff sought to prevent the Secretary of Defense's conveyance of a closed military base to a Maryland state-created development corporation. On January 14, 2002, this court denied the plaintiff's motions concluding that the plaintiffs failed to demonstrate, *inter alia*, a substantial likelihood of success on the merits because the failure to provide sufficient notice was not likely final action subject to judicial review and that the plaintiff failed to show that the defendants' decision lacks a reasonable basis or is not in accordance with applicable law. *Role Models Am., Inc. v. White (Role Models I)*, 193 F. Supp. 2d 76 (D.D.C. 2002). The D.C. Circuit reversed this court's determination and concluded that the insufficient notice was final agency action and that the defendants violated applicable statutory and regulatory requirements by failing to provide sufficient notice. *Role Models Am., Inc. v. White (Role Models II)*, 354 U.S. App. D.C. 425, 317 F.3d 327 (D.C. Cir. 2003). The D.C. Circuit remanded

with instructions to enter a permanent injunction against the conveyance until the government remedied the procedural errors. *Id.* Now pending before the court are the defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and the plaintiff's motion for leave to file a sur-reply. After consideration of the parties' submissions and relevant law, the court denies the plaintiff's motion for leave to file a sur-reply. Because the defendants have not cured the procedural defects as set forth by the D.C. Circuit, the court denies the defendants' motion to dismiss and enters a permanent injunction enjoining the defendants from conveying the property until the government cures the procedural defects.

II. BACKGROUND[2]

The plaintiff, Role Models America, Inc. ("RMA"), is a non-profit Maryland corporation that sought to establish a military-style high school for troubled youth at Fort Ritchie, a military installation in Maryland that was designated for closure during the mid-1990s. *Role Models I*, 193 F. Supp. 2d at 77-78. The Fort Ritchie property is surplus real property and is available under the provisions of the Federal Property Administrative Services Act of 1945, as amended 40 U.S.C. § 101 *et seq.* ("FPASA"), and the DBCRA. The DBCRA "establishes

2. Because the facts of this case are fully set forth in *Role Models Am., Inc. v. White, et al.*, 354 U.S. App. D.C. 425, 317 F.3d 327 (D.C. Cir. 2003) and *Role Models Am., Inc. v. White, et al.*, 193 F. Supp. 2d 76 (D.D.C. 2002), the court recounts them only briefly here.

a mechanism for the timely closure and realignment of military installations inside the United States.'" *Role Models II*, 317 F.3d at 329 (citing DBCRA § 2901(b)). The Local Redevelopment Authority ("LRA"), Pen Mar Development Corporation of Maryland ("Pen Mar"), is a creature of Maryland statute with the purpose of developing the Fort Ritchie property. *Role Models I*, 193 F. Supp. 2d at 77-78. The DBCRA requires the Secretary of Defense and the LRA to provide specific notices of the surplus property and sets forth specific procedures to convey the surplus property. *Role Models II*, 317 F.3d at 329. The DBCRA sets forth further procedures that the Secretary of Defense must follow to dispose of the surplus property. *See* Discussion Part III.B.3 *infra*.

On July 24, 2001, after the plaintiff's efforts to acquire the surplus property proved unsuccessful, the plaintiff filed suit against the Secretary of the Army and the Secretary of Education in this court alleging that the defendants committed procedural errors in determining to convey the property to Pen Mar, thereby depriving the plaintiff of an opportunity to compete for the property. *Role Models II*, 317 F.3d at 331. Specifically, the plaintiff sought a temporary restraining order and a preliminary injunction enjoining the conveyance of the property until the government complies with the regulatory requirements, provides sufficient notice of the availability of the property, and conducts a proper screening. *Id.*

On January 14, 2002, this court denied the plaintiff's motions for a preliminary injunction and a temporary

restraining order, concluding that the plaintiff failed to establish the four-pronged showing required to justify such extraordinary relief, as applied in, *inter alia*, *Taylor v. Resolution Trust Corp.*, 312 U.S. App. D.C. 427, 56 F.3d 1497 (D.C. Cir. 1995). *Role Models I*, 193 F. Supp 2d at 79-88. Specifically, this court concluded that the plaintiff failed to show (1) a substantial likelihood of success on the merits; (2) that irreparable injury would result in the absence of the requested relief; (3) that the other interested parties will not suffer substantial harm if the injunction is granted; and (4) that the public interest favors entry of a preliminary injunction. *Id.* The D.C. Circuit reversed this court's decision on interlocutory appeal, holding that there was final agency action subject to judicial review and that the plaintiff established that the defendants' conveyance procedures were defective and deprived RMA of a valuable right to participate in the public benefit conveyance. *Role Models II*, 317 F.3d at 333-34. The D.C. Circuit "remanded [back to this court] with instructions to enter a permanent injunction against the conveyance of the Fort Ritchie property until the government remedies the procedural errors." *Id.*

This feud rested dormant for nearly three years, with the defendants remaining enjoined and attempting to cure the procedural defects set forth by the D.C. Circuit. Defs.' Mot. at 1-2. The defendants now come before this court avering that they cured the procedural deficiencies and are prepared to convey the surplus property and therefore request that the court dismiss the plaintiff's complaint as moot and lift the

encumbrance on the property. *See generally* Defs.' Mot. The plaintiff vehemently opposes the defendants' motion, contending that the defendants have yet to remedy the procedural defects and must attempt the screening procedures a third time. *See generally* Pl.'s Opp'n. The court now turns to the pending motions.

III. ANALYSIS

A. The Court Denies the Plaintiff's Motion for Leave to File a Sur-reply

The decision to grant or deny leave to file a sur-reply is committed to the sound discretion of the court. *Am. Forest & Paper Ass'n, Inc. v. Envtl. Prot. Agency*, 1996 U.S. Dist. LEXIS 13230, 1996 WL 509601, at *3 (D.D.C. Sept. 4, 1996). If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply. *Ben-Kotel v. Howard Univ.*, 355 U.S. App. D.C. 82, 319 F.3d 532, 536 (D.C. Cir. 2003); *Natural Res. Def. Council, Inc. v. Envtl. Prot. Agency*, 306 U.S. App. D.C. 357, 25 F.3d 1063, 1072 n.4 (D.C. Cir. 1994); *Pa. Elec. Co. v. Fed. Energy Regulatory Comm'n*, 304 U.S. App. D.C. 163, 11 F.3d 207, 209 (D.C. Cir. 1993); *see also Herbert v. Nat'l Acad. of Scis.*, 297 U.S. App. D.C. 406, 974 F.2d 192, 195 (D.C. Cir. 1992) (acknowledging that consideration of arguments raised for the first time in a reply would be "manifestly unfair" to the respondent); *Corson & Gruman Co. v. Nat'l Labor*

Relations Bd., 283 U.S. App. D.C. 239, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (requiring parties to raise all of their arguments in their opening briefs "to prevent sandbagging"); *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 113 (D.D.C. 2002) (denying leave to file a sur-reply where the proposed sur-reply merely reiterated prior arguments); *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001) (denying leave to file a sur-reply where the plaintiff failed to demonstrate that the defendant's reply presented any new matters).

Because the plaintiff fails to persuade the court that the defendants raised new arguments in their reply that deem the plaintiff's sur-reply necessary, the court denies the plaintiff's motion to file a sur-reply. While the plaintiff's counsel's arguments of unfamiliarity with the case and remorse in not setting forth a more thorough record in its opposition to the defendants' motion to dismiss are creative, they are unpersuasive as to the necessity of a sur-reply.

B. The Defendants' Motion to Dismiss

Before embarking on this voyage, the court takes a moment to discuss its authority. A bedrock principle crucial to the procedural posture of this case is that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306, 92 L. Ed. 1403, 68 S. Ct. 1039 (1948) (citing cases). Accordingly, this court limits its analysis to the narrow issues properly before it on remand, that is whether the defendants have cured the

procedural defects identified by the D.C. Circuit to trigger lifting the encumbrance on the Fort Ritchie property. *Role Models II*, 317 F.3d at 333-34. What further sets this case outside the norm is that it deals with one of the most potent measures of restraint available under law, an injunction. Interim injunctive relief is an extraordinary form of judicial relief that courts grant sparingly. *Mazurek v. Armstrong*, 520 U.S. 968, 972, 138 L. Ed. 2d 162, 117 S. Ct. 1865 (1997). As the Supreme Court has said, "it frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Id.* (citation omitted). That being said, the court turns to the merits pertaining to the defendants' pending motion to dismiss.

1. Legal Standard for Mootness

Under Rule 12(b)(1), a party may move to dismiss a case on grounds of mootness. *Comm. in Solidarity with People of El Salvador v. Sessions*, 289 U.S. App. D.C. 149, 929 F.2d 742, 744 (D.C. Cir. 1991); *Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054, 1060 (Fed. Cir. 1995); *Am. Historical Ass'n v. Peterson*, 876 F. Supp. 1300, 1308 (D.D.C. 1995). Article III's case-or-controversy requirement prohibits courts from issuing advisory opinions or decisions based on hypothetical facts or abstract issues. *Flast v. Cohen*, 392 U.S. 83, 96, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968). "The doctrine of mootness is a logical corollary of the case or controversy requirement. "*Better Gov't Ass'n v. Dep't of State*, 250

U.S. App. D.C. 424, 780 F.2d 86, 90 (D.C. Cir. 1986). In cases where challenged conduct ceases and "there is no reasonable expectation that the wrong will be repeated, . . . it becomes impossible for the court to grant any effectual relief whatever to the prevailing party, and any opinion as to the legality of the challenged action would be advisory." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000). Accordingly, a court may not rule on the merits of a case presenting a moot claim.

Courts must evaluate mootness "through all stages" of the litigation in order to ensure that a live controversy remains. *21st Century Telesis Joint Venture v. FCC*, 355 U.S. App. D.C. 1, 318 F.3d 192, 198 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000) and *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)). As a result, "even where litigation poses a live controversy when filed, the [mootness] doctrine requires a federal court to refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" *Id.* (quoting *Clarke v. United States*, 286 U.S. App. D.C. 256, 915 F.2d 699, 701 (D.C. Cir. 1990)).

A case is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *City of Erie*, 529 U.S. at 287 (internal quotations omitted). An intervening event may

render a claim moot if (1) there is no reasonable expectation that the conduct will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violations. *Pharmachemie B. V. v. Barr Labs., Inc.*, 349 U.S. App. D.C. 284, 276 F.3d 627, 631 (D.C. Cir. 2002); *Sellers v. Bureau of Prisons*, 294 U.S. App. D.C. 361, 959 F.2d 307, 310 (D.C. Cir. 1992). A case is not moot, however, so long as any single claim for relief remains viable, as the remaining live issues satisfy the case-or-controversy requirement. *Tucson Med. Ctr. v. Sullivan*, 292 U.S. App. D.C. 105, 947 F.2d 971, 978 (D.C. Cir. 1991) (internal quotations and citations omitted). The burden of establishing mootness rests on the party raising the issue, and it is a heavy burden. *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 97 L. Ed. 1303, 73 S. Ct. 894 (1953); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 330 U.S. App. D.C. 1, 142 F.3d 449, 458-59 (D.C. Cir. 1998).

2. The Defendants' Prior Procedures That the D.C. Circuit Deemed Insufficient

On May 10 and 15, 1996, the Department of Defense ("DOD") published identical notices in the Federal Register and a local newspaper. *Role Models II*, 317 F.3d at 330. The notices were solely directed at those interested in homeless assistance. *Id.* at 332. Because the plaintiff is "an organization devoted to establishing schools for at-risk minors," the D.C. Circuit concluded that it could "not imagine how [RMA] . . . could possibly

have interpreted a notice entitled Homeless Assistance Outreach Initiative' as an invitation to apply for the Fort Ritchie property." *Id.* Furthermore, none of the requirements set forth in the notices "could relate to a proposal from [RMA] to operate a school for at-risk student." *Id.* In light of that, the D.C. Circuit concluded that "the two notices thus failed to fulfill the requirement that the LRA '*shall* publish' the time period in which it will receive notices from representatives of the homeless[] *and other interested parties.*'" *Id.* (citations omitted) (alterations and emphasis in original). Finding that the government failed to rebut "the fact that potential public benefit conveyees such as [RMA] failed to receive the notice required by regulation[,]" the D.C. Circuit determined that "the LRA's procedural errors prevented [RMA] from triggering a public benefit conveyance screening, thereby depriving it of a valuable right under the [DBCRA]." *Id.*

The court interprets the D.C. Circuit's decision as holding that the defendants' notice to homeless initiatives was adequate, but that the defendants' notice to other interested parties was inadequate. Therefore, it is the latter that requires remedy by the defendants.

3. The Proper Procedure as Articulated by the D.C. Circuit

Because this case returns to the court on remand from the D.C. Circuit with instructions to issue a permanent injunction until the defendants cure the procedural defects, the court recites the proper

procedure verbatim, as set forth by the court above. As the D.C. Circuit aptly explained:

> The [DBCRA] requires the Secretary of Defense to determine, within six months of a decision to close a military base, whether other federal departments or agencies can use the property. [DBCRA] § 2905(b)(5)(A). If none can, the Secretary must "publish in the Federal Register and in a newspaper of general circulation in the communities in the vicinity of the installation," *id.* § 2905(b)(7)(B)(i)(IV), an announcement that "surplus" property exists, *id.* § 2905(b)(7)(B)(i)(II). Thirty days thereafter, the Local Redevelopment Authority (LRA), an entity "established by State or local government and recognized by the Secretary of Defense," 24 C.F.R. § 586.5; 32 C.F.R. § 176.5, must "publish, . . . in a newspaper of general circulation in the communities in the vicinity of the installation, the time period during which the LRA will receive notices of interest from . . . representatives of the homeless[] and other interested parties," 24 C.F.R. § 586.20(c)(1); 32 C.F.R. § 176.20(c)(1). Notices of interest "shall describe the need of the [applicant] for the buildings or property," DBCRA § 2905(b)(7)(C)(i), and must include, at a minimum, "a description of the planned use," 24 C.F.R. § 586.20(c)(2)(ii)-(2)(iii); 32 C.F.R.

§ 176.20(c)(2)(ii)-(2)(iii). "Other interested parties" means "any parties eligible for the conveyance of property . . . under . . . the Federal Property and Administrative Services Act of 1949 [(FPASA), 40 U.S.C. § 101 *et seq.*]," DBCRA § 2905(b)(7)(P) — a statute designed to provide "an economical and efficient system for . . . disposing of surplus [federal] property," 40 U.S.C. § 101(3). Non-profit educational institutions, if recommended by the Secretary of Education, are among the groups eligible for FPASA conveyances. *Id.* § 550(c).

After the LRA publishes the required notice, the process bifurcates: Notices of interest submitted by representatives of the homeless and those submitted by FPASA-eligible "other interested parties" are considered on separate, parallel tracks. On the homeless-assistance track, the LRA begins by considering both homeless submissions and potential commercial uses in order to formulate a comprehensive redevelopment plan for the surplus property. DBCRA § 2905(b)(7)(F). The LRA then submits its plan to the Secretary of Housing and Urban Development, who in turn determines whether the LRA has "balanced" commercial and homeless needs "in an appropriate manner." *Id.* § 2905(b)(7)(H)(i)(III). Meanwhile, on the other track, the Secretary

> of Defense evaluates any notices of interest submitted by FPASA-eligible parties. *Id.* § 2905(b)(7)(K)(v). This process occurs *before* the LRA submits its plan to the HUD secretary. *Id.* If the Secretary of Defense determines that an "other interested" applicant meets the eligibility standards established by the FPASA and associated regulations, the Secretary effects a "public benefit conveyance" of the requested property to that party. *Id.* After completion of the two parallel processes — that is, after the Secretary of Defense has conducted the public benefit conveyance screenings and the HUD Secretary has approved the LRA's plan — the Secretary of Defense "shall dispose" of the remaining base property, giving "substantial deference" to the LRA's redevelopment plan. *Id.* § 2905(b)(7)(K)(i), (K)(iii).

Role Models II, 317 F.3d at 329-30. The court next applies the defendants' recent remedial efforts in turn to the foregoing procedure.

4. The Court Denies the Defendants' Motion to Dismiss

The plaintiff raises a potpourri of arguments as to how and why it was somehow duped from obtaining the Fort Ritchie property. First, the plaintiff argues that the defendants acted in bad faith and "wreaked havoc

upon Plaintiffs and effectively done everything to destroy them and prohibit their participation as the social catalyst in the property's development." Pl.'s Opp'n at 4. Among the defendants' alleged bad faith conduct in the instant suit, the plaintiff claims that Pen Mar temporarily financially crippled RMA by forcing it to pay nearly one-third of its $ 10 million grant in unwarranted lease payments and that the DOE then used RMA's poor financial condition as a pretext of denying its no-cost public conveyance. Pl.'s Opp'n at 4-6. RMA additionally discusses that it could obtain additional funds by lobbying Congress and that it only requires $ 1 million to re-start its program. *Id.* In bolstering it arguments, the plaintiff notes that it presently has an action for damages pending before another member of this court against these defendants and others seeking a direct no-cost conveyance to RMA of 587 acres of the Fort Ritchie land and millions of dollars in compensatory damages for numerous claims, including alleged constitutional violations, unjust taking, conspiracy to deprive the plaintiffs of their civil rights in violation of 42 U.S.C. § 1985, breach of contract and unjust enrichment, fraudulent inducement, tortious interference with prospective advantage, and conversion. Pl.'s Opp'n at 4 n.2; *Role Models Am. Inc., et al. v. PenMar Development Corp., et al.*, 394 F. Supp. 2d 121, 2005 U.S. Dist. LEXIS 22552, No. 04-cv-0130 (JDB). Second, the plaintiff alleges that Pen Mar is not a legal entity and does not have the authority to act as the LRA. *Id.* at 13-15. Third, the plaintiff contends that the Army has not met its burden in proving that "RMA could not or cannot create the jobs and economic

development of [Fort Richie] versus the LRA[,]" Pl.'s Opp'n at 12, thus failing to satisfy the DBCRA's preference for a public benefit conveyance over the commercial development of closed military bases, *id.* at 11.

The defendants contend that the bulk of the plaintiff's arguments, that is, those not contemplating the defendants' curing the procedural defects identified by the D.C. Circuit, are not properly before this court. Defs.' Reply at 6-8. The court agrees. The D.C. Circuit's mandate provided specific instructions for this court to follow: "to enter a permanent injunction against conveyance of the Fort Ritchie property until the government remedies the procedural errors described above." *Role Models II*, 317 F.3d at 333-34. This court is bound by the D.C. Circuit's decree "as the law of the case, and it must carry it into execution according to the mandate." *In re Sanford Fork & Trading Co. et al.*, 160 U.S. 247, 255, 40 L. Ed. 414, 16 S. Ct. 291 (1895); *see also Briggs v. Pa. R.R. Co.*, 334 U.S. at 306-307; *City of Cleveland, Ohio v. Fed. Power Comm'n*, 182 U.S. App. D.C. 346, 561 F.2d 344, 346-47 (D.C. Cir. 1977) (stating that "the decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of (the) court deciding the case") (footnotes and citations omitted).

Furthermore, while the plaintiff claims that the defendants acted in bad faith and questions Pen Mar's legal status, it fails to support these bald allegations in fact or otherwise. The court further notes that these claims have been or are currently being litigated in other fora. In other words, the court is aware that the parties have engaged in numerous litigations against one another, and this court is not the forum for duplicative or repetitious litigation. Specifically, this court determined and the D.C. Circuit agreed that Pen Mar is indeed a creature of Maryland statute and is the Fort Richie LRA, just as the Circuit Court of Washington County, Maryland determined that Pen Mar was a properly constituted entity on June 29, 2001. *Role Models II*, 317 F.3d at 329; *Role Models I*, 193 F. Supp. at 77-78; Defs.' Reply, Ex. 2. As the court previously stated, it is "without power to reconsider issues decided on a previous appeal[,]" whether those issues were expressly or implicitly decided. *Maggard v. O'Connell et al.*, 227 U.S. App. D.C. 62, 703 F.2d 1284, 1289 (D.C. Cir. 1983). Moreover, the doctrine of collateral estoppel or issue preclusion prevents this court from redeciding those issues. Issue preclusion "prevents the relitigation of any issue that was raised and decided in a prior action." *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co., 232 U.S. App. D.C. 418, 723* F.2d 944, 949 (D.C. Cir. 1983); *Novak v. World Bank*, 227 U.S. App. D.C. 83, 703 F.2d 1305, 1309 (D.C. Cir. 1983). In this way, collateral estoppel, like res judicata, helps "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and [] prevent serial forum-shopping and piecemeal litigation."

Hardison v. Alexander, 211 U.S. App. D.C. 51, 655 F.2d 1281, 1288 (D.C. Cir. 1981); *see also Allen v. McCurry*, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980).

The damages sought for the defendants' alleged bad faith are matters the plaintiff brought three years after initiating this action, and are the subject of a pending litigation suit for damages before another member of this court. *Role Models Am. Inc.*, 2005 U.S. Dist. LEXIS 22552, No. 04-cv-0130 (JDB). Moreover, the plaintiff's complaint and original motions that were the subject of the extraordinary relief granted by the D.C. Circuit are devoid of these claims. Therefore these arguments are inappropriate for two reasons. First, litigating the same issues in two separate fora runs contrary to judicial economy, the parties' best interests, and consistency of judicial opinions. *Nat'l Shopmen Pension Fund et al. v. Folger Adam Sec.*, 274 B.R. 1, 2002 U.S. Dist. LEXIS 3079 (D.D.C. Feb. 12, 2002); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 81 L. Ed. 153, 57 S. Ct. 163 (1936). Second, the introduction of these claims, in an opposition to a motion to dismiss on a narrow issue before the district court on remand, is wholly inappropriate at this stage of the litigation. *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (stating that introducing arguments in oppositions to motions to dismiss is an inappropriate mechanism for amending complaints); *see also City of Cleveland*, 561 F.2d at 346-47 (stating that the lower court is confined to the bounds of a remand). The D.C. Circuit's mandate specifically ordered this court to enter a permanent injunction until the defendants cured the procedural defects identified

in the opinion. Accordingly, the court turns to the arguments regarding whether or not the defendants have cured the procedural defects.

a. The Defendants' Attempted Curing of Remedial Defects

On October 3, 2003, the U.S. Army of Corps Engineers published in the Federal Register, an announcement that surplus real property at Fort Richie exists. Defs.' Mot. at 3, Ex. 1. On October 11, 1003, the U.S. Army Corps of Engineers published a notice of the availability of the surplus property in *The Herald Mail*, a daily newspaper of general circulation near Fort Ritchie. *Id.* at 3-4. Two days later, the U.S. Army Corps of Engineers published a similar notice in *The Record Herald*, a daily paper that circulates in the Fort Ritchie Area. *Id.* at 4, Ex. 2. These notices state that "the property available for surplus is not being screened for potential homeless use." Defs.' Mot., Exs. 1, 2; Pl.'s Opp'n at 6, Ex. 5.

With regard to the LRA, on October 10, 2003, Pen Mar, published notices advertising the availability of the surplus real property in three newspapers local to the Fort Richie area: *The Record Herald, The Herald-Mail*, and *The Frederick News-Post. Id.* at 4, Ex. 3. The LRA, moreover, sent the plaintiff's counsel actual notice of the availability of the surplus real property by way of letter accompanied by the three newspaper advertisements. *Id.* at 4, Ex. 4.

The DOE also published notice of the availability of the surplus real property. Defs.' Mot. at 5. On October 7, 2003, the DOE further sent the notice to numerous Maryland school districts, state and local officials, and to the plaintiff's counsel. *Id.* at 5, Ex. 5. While the October 7, 2003 notice established November 3, 2003, as the deadline for interested parties to provide expressions of interest, on October 10, 2003, the DOE issued a subsequent notice extending the deadline to January 9, 2004. *Id.* at 5, Ex. 6. The LRA mailed the DOE's October 10, 2003 notices to numerous non-profit organizations as well as local and state government entities. *Id.* at 5, Ex. 7. Indeed, several entities submitted expressions of interest. *Id.* at 5, Ex. 8.

The plaintiff received notice, as it submitted an application to the DOE for a no-cost public benefit conveyance of the surplus real property for its school. Defs.' Mot. at 5, Ex. 12. The DOE denied RMA's application thereby rendering it unqualified to receive a no-cost benefit conveyance. *Id.* at 5-6.

The court concludes that the defendants' notice to other interested parties was adequate. The court further concludes that the plaintiff indeed received adequate notice of the public conveyance screening. The court rejects the plaintiff's argument that it is a homeless provider and was denied the right to apply for the surplus property as a homeless initiative. The plaintiff contends that the because the defendants' notice in the Federal Register and *The Herald Newspaper* state that "the property available for surplus is not being screened

for potential homeless use[,]" Pl.'s Opp'n at 6, Ex. 5, the defendants violated the law and their procedures remain defective, Pl.'s Opp'n at 6. The plaintiff claims that it would have been eligible to apply as a homeless initiative, had the defendants' notices included applications by homeless initiatives. *Id.* at 6-7. Because the RMA was unable to attempt to obtain the property via the second avenue of a homeless initiative due to the LRA's failure to properly address homeless initiatives as required by the DBCRA, the defendants' re-screening procedural defects again deprived the plaintiff a right under the DBCRA. *Id.* at 7. To illustrate the obtuseness of this argument, the court reminds the plaintiff that it initially brought suit because, as an education provider, it did not receive adequate notice of the availability of the surplus property because the notice was directed at homeless initiatives. What's more, as indicated above, the D.C. Circuit stated that it "cannot imagine how Role Models, an organization devoted to establishing schools for at-risk minors, could possibly have interpreted a notice entitled Homeless Assistance Outreach Initiative' as an invitation to apply for the Fort Richie property." *Role Models II*, 317 F.3d at 332. In other words, it is because the plaintiff is not a homeless provider that the D.C. Circuit reversed this court, finding that the plaintiff was deprived of adequate notice due to the fact that the defendants' notices were directed at homeless providers, which the plaintiff argued and the D.C. Circuit accepted that it is not.

b. The Defendants Failed to Remedy the Procedural Defects

The defendants argue that because the Army, the LRA, and the DOE issued notices of the surplus property in compliance with applicable regulations and cured the defects the D.C. Circuit reprimanded them for, the case should be dismissed as moot. Defs.' Mot. at 6-8. The defendants further argue that because the plaintiff was the only entity to submit an application to the DOE for a public conveyance and was denied, the plaintiff is unable to otherwise acquire the property and therefore lacks standing to bring this suit. *Id.*

The plaintiff counters that the defendants' procedures for disposing of the property are still defective because the defendants failed to submit an appropriate redevelopment plan. Pl.'s Opp'n at 6-11. The plaintiff further contends that the LRA violated the law by failing to submit the required revised redevelopment plan to the Secretary of Defense and HUD after the public benefit conveyance screening, failing to permit the public to comment on a revised redevelopment plan, and perhaps even failing to prepare a revised plan at all. *Id.* at 8-11. Instead, the defendants' only submitted redevelopment plan was the one previously submitted in May 1997, which (1) is outdated and was submitted prior to the re-screening; and (2) was determined by an Army review panel in October 2001, to be not viable or sufficient to develop the Fort Ritchie site and not financially feasible. *Id.* 8-11, Ex. 7.

Appendix C

The D.C. Circuit was clear in its opinion that the process for track two, whereby the Secretary of Defense evaluates any notices of interest submitted by FPASA-eligible parties, occurs *before* the LRA submits its plan to the HUD secretary. *Role Models II*, 317 F.3d 327 at 329-30 (citing DCBRA § 2905(b)(7)(K)(v)). Here, the plaintiffs have adequately shown, and the defendants have failed to rebut, that the redevelopment plan was submitted to HUD in 1997, whereas the Secretary of Defense did not evaluate notices of interest submitted by FPASA-eligible parties until 2004. Accordingly, the court concludes that the defendants have not yet cured the procedural defects and denies the defendants' motion to dismiss. Pursuant to the D.C. Circuit's directives, the LRA must still "submit[] its plan to the Secretary of Housing and Urban Development, who in turn determines whether the LRA has balanced commercial and homeless needs "in an appropriate manner.' [DBCRA] § 2905(b)(7)(H)(i)(III) . . . After completion of the two parallel processes — that is, after the Secretary of Defense has conducted the public benefit conveyance screenings and the HUD Secretary has approved the LRA's plan — the Secretary of Defense shall dispose' of the remaining base property, giving substantial deference to the LRA's redevelopment plan. *Id.* 2905(b)(7)(K)(I), (K)(iii)." *Role Models II*, 317 F.3d 327 at 329-30.

IV. CONCLUSION

For the foregoing reasons, the court denies the plaintiff's motion for leave to file a sur-reply and denies without prejudice the defendants' motion to dismiss. Consistent with the D.C. Circuit's directives, the defendants are permanently enjoined from conveying the property until they remedy the procedural defects identified by the D.C. Circuit and this court. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 18th day of May 2005.

RICARDO M. URBINA
United States District Judge

ORDER

DENYING THE PLAINTIFF'S MOTION FOR LEAVE TO FILE A SUR-REPLY AND DENYING THE DEFENDANTS' MOTION TO DISMISS WITHOUT PREJUDICE

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued,

it is this 18th day of May 2005,

ORDERED that the plaintiff's motion for leave to file a sur-reply is **DENIED**; and it is

FURTHER ORDERED that the defendants' motion to dismiss is **DENIED** without prejudice.

Appendix C

SO ORDERED.

RICARDO M. URBINA
United States District Judge

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DECIDED FEBRUARY 4, 2003

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 02-5037

ROLE MODELS AMERICA, INC.,

Appellant,

v.

THOMAS E. WHITE, Secretary of the Army, and Roderick R. Paige, Secretary of the Department of Education,

Appellees.

Argued Dec. 5, 2002
Decided Feb. 4, 2003

Before: GINSBURG, Chief Judge, and ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

This case involves a challenge to the Secretary of Defense's decision to convey a closed military base to a

state-created development corporation. Because the procedures by which the Secretary reached this decision violated applicable statutory and regulatory requirements, we reverse the district court's contrary conclusion and remand with instructions to enjoin the conveyance.

I.

The Defense Base Closure and Realignment Act of 1990 (DBCRA), 104 Stat. 1808 (codified as amended at 10 U.S.C. § 2687 note), establishes a mechanism for the "timely closure and realignment of military installations inside the United States." *Id.* § 2901(b) (for ease of reference, all citations to the DBCRA are to the Act as it appears in note following 10 U.S.C. § 2687). The Act requires the Secretary of Defense to determine, within six months of a decision to close a military base, whether other federal departments or agencies can use the property. *Id.* § 2905(b)(5)(A). If none can, the Secretary must "publish in the Federal Register and in a newspaper of general circulation in the communities in the vicinity of the installation," *id.* § 2905(b)(7)(B)(i)(IV), an announcement that "surplus" property exists, *id.* § 2905(b)(7)(B)(i)(II). Thirty days thereafter, the Local Redevelopment Authority (LRA), an entity "established by State or local government and recognized by the Secretary of Defense," 24 C.F.R. § 586.5; 32 C.F.R. § 176.5, must "[p]ublish, . . . in a newspaper of general circulation in the communities in the vicinity of the installation, the time period during which the LRA will receive notices of interest from . . . representatives of

the homeless[ ] and other interested parties," 24 C.F.R. § 586.20(c)(1); 32 C.F.R. § 176.20(c)(1). Notices of interest "shall describe the need of the [applicant] for the buildings or property," DBCRA § 2905(b)(7)(C)(i), and must include, at a minimum, "a description of the planned use," 24 C.F.R. § 586.20(c)(2)(ii)-(2)(iii); 32 C.F.R. § 176.20(c)(2)(ii)-(2)(iii). "Other interested parties" means "any parties eligible for the conveyance of property . . . under . . . the Federal Property and Administrative Services Act of 1949 [(FPASA), 40 U.S.C. § 101 *et seq.*]," DBCRA § 2905(b)(7)(P)-a statute designed to provide "an economical and efficient system for . . . [d]isposing of surplus [federal] property," 40 U.S.C. § 101(3). Non-profit educational institutions, if recommended by the Secretary of Education, are among the groups eligible for FPASA conveyances. *Id.* § 550(c).

After the LRA publishes the required notice, the process bifurcates: Notices of interest submitted by representatives of the homeless and those submitted by FPASA-eligible "other interested parties" are considered on separate, parallel tracks. On the homeless-assistance track, the LRA begins by considering both homeless submissions and potential commercial uses in order to formulate a comprehensive redevelopment plan for the surplus property. DBCRA § 2905(b)(7)(F). The LRA then submits its plan to the Secretary of Housing and Urban Development, who in turn determines whether the LRA has "balance[d]" commercial and homeless needs "in an appropriate manner." *Id.* § 2905(b)(7)(H)(i)(III). Meanwhile, on the other track, the Secretary of Defense evaluates any

notices of interest submitted by FPASA-eligible parties. *Id.* § 2905(b)(7)(K)(v). This process occurs *before* the LRA submits its plan to the HUD secretary. *Id.* If the Secretary of Defense determines that an "other interested" applicant meets the eligibility standards established by the FPASA and associated regulations, the Secretary effects a "public benefit conveyance" of the requested property to that party. *Id.* After completion of the two parallel processes — that is, after the Secretary of Defense has conducted the public benefit conveyance screenings and the HUD Secretary has approved the LRA's plan — the Secretary of Defense "shall dispose" of the remaining base property, giving "substantial deference" to the LRA's redevelopment plan. *Id.* § 2905(b)(7)(K)(i), (K)(iii).

This case involves the application of the DBCRA's disposition procedures to Fort Ritchie, a U.S. Army base located in the Catoctin mountains of western Maryland. Fort Ritchie's history as a military installation began in 1926 when Maryland purchased the property — previously a resort for wealthy Mid-Atlantic urbanites — to create a national guard training site, naming it for then-Governor Albert C. Ritchie. Military District of Washington, *Fact Sheet: Fort Ritchie Background, at* http://www.mdw.army.mil/fs-i12.htm (Dec. 11, 2002). During World War II, the Army used Fort Ritchie for counterintelligence training, including staging mock Nazi rallies in a specially built *faux* Bavarian village. *See* Steve Vogel, *In Western Md., Fort Ritchie Leaving Military for Civilian Life*, Wash. Post, July 17, 1998, at C1. The Army even brought German and Japanese

prisoners-of-war to the base to provide trainees with authentic interrogation experience. *Id.* During the 1950s, the Army used the fort as a support base for nearby Site R, a top-secret command structure known as the "underground Pentagon." *Id.* Beginning in the 1970s, Fort Ritchie became a high-tech military communications center. *Id.* By the mid-1990s, however, the fort had outlived its usefulness, and the Secretary of Defense and the President slated it for closure during the 1995 base closure round. *See* Notice of Recommended Base Closures and Realignments, 60 Fed.Reg. 11414, 11436 (Mar. 1, 1995) (Secretary of Defense recommending closure of the base); President's Message to Congress Transmitting Recommendations of the Defense Base Closure and Realignment Commission, H.R. Doc. No.. 104-96, at 1 (1995) (President accepting recommendation).

On May 10 and May 15, 1996, the Department of Defense, acting pursuant to its duties under the Act, published notices in the Federal Register and a local newspaper. *See* Notice of Availability of Surplus Land and Buildings in Accordance with Public Law 103-421 Located at Fort Ritchie Military Reservation, Cascade, MD, 61 Fed.Reg. 21,445-05 (May 10, 1996); The Herald-Mail, May 15, 1996, at C8. Also on May 10, the Fort Ritchie LRA (later renamed PenMar Development Corporation) published two notices, virtually identical to each other, entitled "Homeless Assistance Outreach Initiative." These notices announced:

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The Fort Ritchie Local Redevelopment Authority . . . will receive Notices of Interest from representatives of agencies that seek to serve the needs of our community's homeless population, (Washington County, Maryland and Franklin County, Pennsylvania), until 4:30 p.m., August 9, 1996. . . .

Notices of Interest must include at least the following: a description of the proposed homeless assistance program, including the specific proposed reuse of property or facilities, such as supportive services, job and skills training, employment programs, emergency shelters, traditional or permanent housing, food and clothing banks, treatment facilities or other activities that meet homeless needs as assessment of the need for the program; a description of the extent to which the program is or will be coordinated with other homeless assistance programs in the community; information about the physical requirements necessary to implement the program, including a description of the buildings and property that are necessary in order to carry out the program; a description of the financial plan, the organization and the organizational capacity of the representative to carry out the program; and an assessment of the time required in order to commence carrying out the proposed program.

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Joint Appendix (J.A.) 71 (*reprinting LRA-1 Public Notice, Homeless Assistance Outreach Initiative, Fort Ritchie, Cascade, MD*, The Herald-Mail, May 10, 1996 (page number omitted in J.A.)); *LRA-1 Public Notice, Homeless Assistance Outreach Initiative, Fort Ritchie, Cascade, MD*, The Record Herald, May 10, 1996, at 10B. As of December 1997, when PenMar submitted its redevelopment plan to HUD, the Secretary of Defense had conducted no public benefit conveyance screenings. HUD approved the plan, and then, in August 1998, the Secretary of Defense published a "Record of Decision" (ROD) in the Federal Register accepting the plan. *See* Notice of Record of Decision on the Final Environmental Impact Statement (FEIS) on the Disposal and Reuse of the U.S. Army Garrison, Fort Ritchie, Washington County, Maryland, 63 Fed.Reg. 43383 (August 13, 1998). Under the Act, publication of the ROD obligated the Secretary of Defense to dispose of the property in accordance with the LRA's plan. DBCRA § 2905(b)(7)(K)(iii).

Appellant Role Models America, Inc., a non-profit educational institution, seeks to convert surplus military bases into military-style preparatory academies for at-risk secondary-school dropouts. To support this effort, Congress appropriated $10 million in start-up funding to "establish an academy that consists of a residential center located on the site of a military installation closed or realigned pursuant to a law providing for closures and realignments of such installations." 29 U.S.C. § 2914(g)(2); H.R. Rep No. 105-825, at 1257 (1998) (encouraging Department of Labor to make funds

available to Role Models). Interested in using Fort Ritchie as a school, Role Models approached PenMar in December 1996 about a public benefit conveyance screening. PenMar replied that "it was not the appropriate screening time." Alexander Decl. ¶ 13. Later, PenMar told Role Models that "the screening process for the educational conveyance provisions was not required at Fort Ritchie." *Id.*

Claiming that it was entitled to a public benefit conveyance screening regarding the Fort Ritchie property, Role Models filed suit in the United States District Court for the District of Columbia against the Secretaries of the Army and of Education, requesting a temporary restraining order and a preliminary injunction prohibiting the conveyance of Fort Ritchie to PenMar until the Government conducted a proper screening. The district court denied injunctive relief, finding that Role Models failed to satisfy any of the requirements for a preliminary injunction. *Role Models Am., Inc. v. White*, 193 F.Supp.2d 76 (D.D.C.2002). Role Models appeals, seeking interlocutory relief pursuant to 28 U.S.C. section 1292(a)(1).

II.

As a threshold matter, the Government argues that its action is not "final" within the meaning of section 704 of the Administrative Procedure Act because the Secretary of Defense has yet to convey Fort Ritchie to PenMar. *See* 5 U.S.C. § 704. The standards for determining finality of agency action are well-

established. To be final, an action need not be "the last administrative [action] contemplated by the statutory scheme." *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 590 n. 8 (D.C.Cir.1971). Rather, the question is whether the agency has "impose[d] an obligation, denie[d] a right, or fixe[d] some legal relationship. . . ." *Meredith v. Fed. Mine Safety and Health Review Comm'n*, 177 F.3d 1042, 1047 (D.C.Cir.1999) (internal quotation marks and citation omitted).

Applying this standard, we have no doubt that the Government's action is final. By publishing the ROD, the Defense Department obligated itself to convey the property to PenMar. *See* DBCRA § 2905(b)(7)(K)(iii). Base closure cases that have found a lack of final agency action, *e.g.*, *Dalton v. Specter*, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994), do not require a contrary result since such cases addressed the Secretary of Defense's *nonbinding* base closure recommendations to the President. In any event, the Government's action in this case would be final and reviewable even if the ultimate disposition of Fort Ritchie remained an open question since, according to the Government, potential public benefit conveyees such as Role Models had only until August 9, 1996, the deadline set in the May 10 newspaper notices, to apply for a conveyance. Role Models' disqualification from seeking a public benefit conveyance after that date constitutes "deni[al] [of] a right" for purposes of APA review.

Turning to the merits, the Government argues that the two identical May 10 notices fulfilled the LRA's

obligation to notify "representatives of the homeless[ ] and other interested parties" of the deadline for submitting notices of interest. 24 C.F.R. § 586.20(c)(1); 32 C.F.R. § 176.20(c)(1). We disagree. We cannot imagine how Role Models, an organization devoted to establishing schools for at-risk minors, could possibly have interpreted a notice entitled "Homeless Assistance Outreach Initiative" as an invitation to apply for the Fort Ritchie property. Even if Role Models discounted the title, the notice's very first sentence informs readers that the LRA would "receive Notices of Interest from representatives of agencies that seek to serve the needs of our community's homeless population." Reinforcing the message that the LRA's exclusive interest was in proposals to help the homeless, the notice goes on to describe elements of a suitable submission: "[proposals for] emergency shelters, . . . food and clothing banks, treatment facilities or other activities that meet homeless needs, . . . [and] a description of the extent to which the program is or will be coordinated with other homeless assistance programs in the community. . . ." None of these requirements could relate to a proposal from Role Models to operate a school for at-risk students. The two notices thus failed to fulfill the requirement that the LRA " *shall* [p]ublish" the time period in which it will receive notices from "representatives of the homeless[ ] *and other interested parties*." 24 C.F.R. § 586.20(c)(1) (emphasis added); 32 C.F.R. § 176.20(c)(1) (emphasis added).

The Government argues that the Secretary's May 10 and May 15 notices, which unquestionably fulfilled

the requirements of DBCRA section 2905(b)(7)(B)(i)(IV), performed double-duty by also fulfilling the requirements of 24 C.F.R. section 586.20(c)(1) and 32 C.F.R. section 176.20(c)(1). Again, we disagree. The two notices announcing the surplus property's availability failed to fulfill the entirely different requirements that the regulations impose on the LRA - to inform "representatives of the homeless [ ] and other interested parties" of the deadline for submitting notices of interest. Even if Role Models had been so fluent in DBCRA arcana as to realize that the surplus property announcement obligated the LRA to collect notices of interest soon thereafter, it still would not have known of the August 9 deadline. Contrary to the implication of the Government's argument, we think it quite reasonable to assume that two distinct notice requirements obligating different parties to impart different information are not redundant. *Cf. Moskal v. United States*, 498 U.S. 103, 109, 111 S.Ct. 461, 466, 112 L.Ed.2d 449 (1990) ("[A] court should 'give effect, if possible, to every clause and word of a statute.' ") (citation omitted).

At oral argument, Government counsel insisted that the regulations do not require the LRA to notify "other interested parties" despite language directing that the LRA "*shall*" inform "representatives of the homeless[ ] *and other interested parties*" of the deadline. 24 C.F.R. § 586.20(c)(1) (emphasis added); 32 C.F.R. § 176.20(c)(1) (emphasis added). Urging us to chalk this plain language up to "less than careful draftsmanship," counsel argued that a literal reading is incompatible with

a subsequent regulation providing that "[i]n addition [to the formal notice requirement], the LRA has the option to conduct an *informal* solicitation of notices of interest from [potential public benefit conveyees]." 24 C.F.R. § 586.20(c)(1)(i) (emphasis added); 32 C.F.R. § 176.20(c)(1)(i) (emphasis added). Even were this argument not untimely, *Tarpley v. Greene*, 684 F.2d 1, 7 n. 17 (D.C.Cir.1982) ("[O]ral argument on appeal is not the proper time to advance new arguments or legal theories. . . ."), we would flatly reject it. One provision *requires* that the LRA *formally* notify "representatives of the homeless[ ] and other interested parties"; the other *permits* the LRA to "*informal[ly]*" notify the latter group. Given the well-recognized flaws inherent in constructive notice, *see Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 658, 94 L.Ed. 865 (1950) ("It would be idle to pretend that publication alone . . . is a reliable means of [notification]" since "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper."), it seems neither strange nor redundant to provide for informal notice as a complement to a scheme of formal notice through publication.

In sum, none of the Government's arguments rebuts the fact that potential public benefit conveyees such as Role Models failed to receive the notice mandated by regulation. Nor, in view of the Act's overall structure, can we dismiss this as a merely technical violation. The Secretary of Defense's obligations to (1) conduct public benefit conveyance screenings and

(2) accept only HUD-approved LRA redevelopment proposals, taken together, guarantee that the Government will consider all proposals submitted by public interest groups. These procedural guarantees - checking the LRA's institutional inclination to develop surplus property commercially - mean nothing if public interest groups do not know of their right to submit proposals in the first place.

Role Models' experience perfectly illustrates the need for proper notice. The LRA's procedural errors prevented Role Models from triggering a public benefit conveyance screening, thereby depriving it of a valuable right under the Act. Attempting to turn this error into a defense, the Government argues that because "the LRA received no [timely] notice of interest from [potential public benefit conveyees], . . . there was no public benefit screening notice of interests to consider." Appellees' Br. at 16. This makes no sense. Although the Government is certainly correct that it could not have screened notices of interest that it never received, here it received none precisely because the LRA failed to give proper notice.

The district court's order is reversed and this matter remanded with instructions to enter a permanent injunction against conveyance of the Fort Ritchie property until the Government remedies the procedural errors described above.

So ordered.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED JANUARY 15, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CIV. A. 01-1595 (RMU)

ROLE MODELS AMERICA, INC.,

Plaintiff,

v.

THOMAS E. WHITE, Secretary of the Army, *et al.*,

Defendants.

Jan. 15, 2002

MEMORANDUM OPINION

DENYING THE PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER; DENYING THE PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, AND; DENYING AS MOOT THE DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

URBINA, District Judge.

Appendix E

I. INTRODUCTION

This matter comes before the court on Role Models America, Inc.'s ("the plaintiff") motions for a temporary restraining order and preliminary injunction, and the defendants' motion to dismiss the complaint with prejudice. After consideration of the parties' submissions and relevant law, the court concludes that the plaintiff has failed to sufficiently demonstrate that it has a substantial likelihood of success on the merits, that it will be irreparably harmed, that the balance of hardships favors the issuance of an injunction, or that the public interest will be furthered if the court were to grant the injunctive relief requested. Accordingly, the court will deny the plaintiff's motions for injunctive relief and deny as moot the defendants' motion to dismiss with prejudice, along with the other various motions that have been subsequently filed by the plaintiff.

II. BACKGROUND

A. Factual Background

By way of background, the dispute in this case is centered around the disposal of surplus military property that is part of Fort Ritchie Military Reservation, located in Washington County, northeast of Hagerstown, in the community of Cascade, Maryland at the intersection of Routes 500 and 491. *See* Def.'s Ex. 1. The Fort Ritchie property is available under the provisions of the Federal Property and Administrative Services Act of 1945, as amended 40 U.S.C. § 484(k),

and the Base Closure Community Redevelopment and Homeless Act of 1994, as amended 10 U.S.C. § 2687. *See id.* The surplus real property at Fort Ritchie (hereinafter "the surplus property") encompasses approximately 635.65 acres and contains 252 buildings, totaling 1,384,000 square feet of space. *See id.* The current range of uses of the surplus property includes administrative, residential, retail, open recreation, and special purpose space. *See id.*

The surplus property is currently leased to Pen Mar Development Corporation of Maryland ("Pen Mar"). *See* Pl.'s Ex. 9 ¶ 1.2. The General Assembly of the State of Maryland created Pen Mar as a public corporation for the purpose of developing the Fort Ritchie property. *See* Pl.'s Ex. 11, 13, 14, 15. As such, Pen Mar is a creature of Maryland statute. *See* Chapter 737, Laws of Maryland 1997, Annotated Code of Maryland, Article 83A, § 5-1201 *et seq.*

The plaintiff is a Maryland 501(c)(3) non-profit corporation with its principal place of business in Cascade, Maryland. *See* Compl. ¶ 3. Its objective is to establish and operate a national model Junior Reserve Officers Training Corps college-preparatory magnet school for the nation's high school "drop-outs." *See id.* Congress funds the plaintiff's program through the U.S. Department of Labor. *See* Pl.'s Ex. 16. The plaintiff intends to build military-style schools using surplus property from military base closures, which provide the facilities needed to operate a large residential program of this type. *See id.*

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On March 10, 2006, the plaintiff entered into a sublease agreement with Pen Mar for use of the surplus property. *See* Pl.'s Ex. 9. The terms of that agreement require the plaintiff to pay Pen Mar $1,265,955.00 per year in quarterly installments of $316,498.75 for approximately 275,000 square feet of space. *See id.* ¶ 1.7. The agreement further provides both parties with the option to extend the lease. *See id.* ¶ 1.4. Moreover, the parties noted in the agreement that Pen Mar is acquiring full title to the Fort Ritchie property. *See id.* ¶ 1.2.

Defendant Thomas E. White,[1] Secretary of the Army, is named as a defendant in this action in his official capacity along with the Army (collectively "the defendants"). *See* Compl. ¶ 4. The defendants plan on transferring nearly 280 acres to Pen Mar in the first phase of the Fort Ritchie comprehensive redevelopment plan. *See* Pl.'s Mot. for Expedited Consideration ("Pl.'s Mot. for Exped. Consid."), Ex. 2.

As of April 2001, Pen Mar had at least two pending suits against the plaintiff in Maryland courts respecting Fort Ritchie. *See* Compl. ¶ 29. The first suit concerns Pen Mar's alleged return of the plaintiff's rent check

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1. Although the complaint names Thomas E. White as a defendant in the action, pursuant to Federal Rule of Civil Procedure 25(d)(1), Gregory L. Dahlberg substitutes as the proper defendant. *See* Fed R. Civ. P. 25(d)(1). When a public officer is a party to an action in his official capacity and during its pendency ceases to hold office, the officer's successor is automatically substituted as a party. *See id.*

and a subsequent action against the plaintiff for eviction and back payment in Maryland state court. *See id.* The second suit concerns the improper display of flags at Fort Ritchie. *See id.*

The plaintiff seeks to acquire the Fort Ritchie property through a public benefit conveyance pursuant to the Base Closure Act of 1994, as amended 10 U.S.C. § 2687. *See* Compl. ¶ 32. The plaintiff fears that the defendants will resume negotiations with Pen Mar for execution of the memorandum of agreement for property transfer at Fort Ritchie. *See generally* Pl.'s Reply Mem. in Supp. of Mot. for Exped. Consid. The plaintiff contends that conveyance of Fort Ritchie from the Army to Pen Mar would cause irreparable harm to the plaintiff and its ability to establish a successful program for at-risk youth. *See* Pl.'s Mot. for a Preliminary Injunction ("Pl.'s Prelim. Inj. Mot.") ¶ 6. As such, the plaintiff requests that the court order the defendants to re-open the screening process at Fort Ritchie. *See* Compl. at 1, 10. In the alternative, the plaintiff asks the court to order the Army to directly convey the property to the plaintiff as a public benefit conveyance. *See id.* Accordingly, the plaintiff seeks a temporary restraining order and preliminary injunction preventing the Army from transferring Fort Ritchie to Pen Mar. *See id.* ¶ 3.

The defendants counter the plaintiff's allegations by arguing three points. First, the defendants argue that the plaintiff cannot show irreparable harm because the plaintiff will continue to operate its Academy under

the lease term negotiated in March 2000. *See* Def.'s Opp'n ¶ A. Second, the defendants assert that this court lacks jurisdiction because the matter is not ripe for judicial review. *See id.* ¶ B. On this second point, the defendants state that final agency action has not occurred and that the property has not yet been transferred to Pen Mar. *See id.* Third, the defendants contend that the plaintiff received proper and adequate notice of the availability of the surplus property since the screening process was properly conducted within the meaning of the Base Closure Act. *See id.* ¶ C.

B. Procedural History

By way of procedural history in the case, on July 24, 2001, the plaintiff filed its complaint alleging the following in support of a temporary restraining order and preliminary injunction: (1) the Army violated Base Closure laws, specifically the Base Closure Act of 1994 ("BCA"), as amended 10 U.S.C. § 2687, and the Administrative Procedure Act ("APA"), as amended 5 U.S.C. § 701 *et. seq.*, by negotiating a transfer of the Fort Ritchie property with Pen Mar, thus triggering a final agency action; (2) the Army violated the BCA and the APA by improper notification of the availability of the surplus property, and; (3) the Army violated the BCA and the APA by conducting an improper screening process of the Fort Ritchie property. The complaint further claims that the Army's actions were arbitrary and capricious, an abuse of discretion, and contrary to law in violation of the BCA and the APA.

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On July 25, 2001, the defendants filed an opposition to the plaintiff's motion for a preliminary injunction. The defendants' opposition states that the Army's actions were not arbitrary and capricious, nor contrary to applicable law. Moreover, the Army contends that it conducted the screening process, notice, and lease in compliance with the directives of the BCA. On August 1, 2001, the plaintiff filed a reply reiterating its challenge to the final agency action under the APA for failure to give proper notice and for inadequate conduct of the screening process. On September 25, 2001, the defendants filed a "motion to dismiss or transfer for improper venue, alternatively, to dismiss as unripe for review, or to dismiss in part for failure to state a claim to which relief is entitled, or for summary judgment." On October 11, 2001, the plaintiff filed a "motion for expedited consideration of the plaintiff's motion for a preliminary injunction, to schedule a hearing on the plaintiff's motions, and for production of documents."[2]

The court now turns to these motions and for the reasons that follow, the court denies the plaintiff's motions for a temporary restraining order and preliminary injunction. Additionally, the court denies as moot the defendants' motion to dismiss along with the plaintiff's various other subsequently filed motions.

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2. The court denies as unripe the plaintiff's request for production of documents because the court has not scheduled an initial status hearing in the case in order to determine the need for such documents relating to the plaintiff's case-in-chief.

Appendix E

III. ANALYSIS

A. Legal Standard for a Preliminary Injunction

In order to succeed on a preliminary injunction, the movant must demonstrate: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will result in the absence of the requested relief; (3) other interested parties will not suffer substantial harm if the injunction is granted, and; (4) that the public interest favors entry of a preliminary injunction. *See Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1506 (D.C.Cir.1995) (applying the four-part test); *see also City of Las Vegas v. Lujan*, 891 F.2d 927, 931 (D.C.Cir.1989) (affirming denial of an injunction after the district court properly applied the four-part test); *Sea Containers, Ltd. v. Stena AB*, 890 F.2d 1205, 1208 (D.C.Cir.1989); *WMATC v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977) In addition, a preliminary injunction is not granted as a matter of right. *See Eli Lilly and Co. v. Premo Pharmaceutical Labs.*, 630 F.2d 120, 136 (3d Cir.1980). Indeed, injunctive relief is an extraordinary remedy and must be sparingly granted. *See Dorfmann v. Boozer*, 414 F.2d 1168 (D.C.Cir.1969). Thus, a court should not grant injunctive relief absent a clear and convincing showing by the moving party. *See Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *accord Kahane v. Secretary of State*, 700 F.Supp. 1162, 1165 (D.D.C.1988).

A district court must balance the four factors previously named. *See Grigsby Brandford & Co. Inc., v.*

United States, 869 F.Supp. 984, 1003 (D.D.C.1994). A court may balance weakness in one or more of the four factors against a particularly strong showing in one of the other factors. *See CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C.Cir.1995). Therefore, injunctive relief "may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable harm." *CityFed Fin. Corp.*, 58 F.3d 738, 747. Consequently, although a "particularly strong likelihood of success on the merits" may entitle a movant to relief upon "a relatively slight showing of irreparable injury," some showing of irreparable injury is always required, "since the basis for injunctive relief in the federal courts has always been irreparable harm." *Id.* (*quoting Sampson v. Murray*, 415 U.S. 61, 88, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974)). Likewise, a court may accept a showing that the movant has a "substantial case on the merits" instead of the probability of success on the merits that is ordinarily required, but only when all of "the other three factors strongly favor [the requested] interim relief." *See WMATC*, 559 F.2d at 843. If the movant fails to demonstrate any irreparable injury, however, the court will not inquire further before denying the injunction. *See Sea Containers, Ltd. v. Stena AB*, 890 F.2d 1205, 1208 (D.C.Cir.1989) (denying preliminary injunctive relief was appropriate where the movant failed to carry the burden of showing sufficient irreparable harm to support a preliminary injunction).

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B. The Court Denies The Plaintiff's Motions for Injunctive Relief for Failure to Make a Clear and Convincing Showing to Justify Relief

1. The Plaintiff Fails to Demonstrate the Likelihood of Success on the Merits

Applying the first prong of the four-part test, the court determines that the plaintiff has failed to sufficiently demonstrate a likelihood of success on the merits of its claim that the defendants' decision to transfer the Fort Ritchie property to Pen Mar, pursuant to the BCA, is arbitrary and capricious or contrary to law. *See* 10 U.S.C. § 2687. Specifically, the plaintiff has not demonstrated a likelihood of success in proving that the defendants' decision is subject to judicial review. *See Taylor*, 56 F.3d at 1506; *Sea Containers Ltd.*, 890 F.2d at 1208; *Holiday Tours, Inc.*, 559 F.2d at 843. Moreover, assuming the court may review the defendant's decision, the plaintiff has not demonstrated a likelihood of success in showing that the defendant's decision lacks a reasonable basis or that it is not in accordance with applicable law. *See id.* The court notes that the BCA appears to provide the necessary legal basis for the Army's regulations that require the Secretary of Defense to publish the selection criteria he proposes to use to recommend installations for closure or realignment in the *Federal Register* for notice and comment. *See* 10 U.S.C. § 2687. Finally, the court concludes that the plaintiff has failed to demonstrate a likelihood of success in showing that the Army's lease and subsequent transfer to Pen Mar violates the BCA.

See Taylor, 56 F.3d at 1506; *Sea Containers Ltd.*, 890 F.2d at 1208; *Holiday Tours, Inc.*, 559 F.2d at 843. The court will address these points in the order that they are raised in the plaintiff's motion.

a. Review of the Secretary's Decision under the APA

(i) The Plaintiff's Claim Relating to the Transfer of Fort Ritchie to Pen Mar Under the Defendants' Comprehensive Redevelopment Plan and the BCA

"The [APA] establishes a 'presumption of judicial review' at the behest of those adversely affected by agency action." *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1513 (D.C.Cir.1989) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)). The APA sets forth the procedures by which federal agencies are held accountable to the public and their actions made subject to judicial review. *See Franklin v. Massachusetts*, 505 U.S. 788, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). Pursuant to the APA, a court may set aside any agency action found to be arbitrary, capricious, an abuse of discretion, or contrary to applicable law. *See* 5 U.S.C. § 706(2). Such a review, however, is only available "to the extent that statutes [do not] preclude judicial review and the agency action is [not] committed to agency discretion by law." *Cohen v. Rice*, 800 F.Supp. 1006, 1009 (D.Me.1992) (quoting 5 U.S.C. § 701(a)). Finally, the APA authorizes judicial review only of "final agency action for which there is no other adequate remedy in a court." *See* 5 U.S.C. § 704. A key issue at the heart of the instant

dispute is whether the challenged actions are "final actions" within the meaning of the APA.

In assessing the finality of the Secretary of the Army's decision, the court looks to *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), in which the Supreme Court stated that the finality of agency action depends on whether its impact "is sufficiently direct and immediate and has a direct effect on day-to-day business." *See id.* An agency action is not final if it is the ruling of a subordinate official or only tentative in nature. *See id* at 151, 87 S.Ct. 1507. The core issues that this court must address are whether the agency has completed its decision-making process and whether the result of that process is one that will directly affect the parties. *See id.*

The standard guiding the court's review of final agency action *requires* deference to the reasonable decision of the agency in light of its expertise in the field. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 42-43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (emphasis added). Moreover, the central question presented herein is not whether other options, such as directly transferring the surplus property to the plaintiff, could have been adopted by the defendants, but whether the defendants' actual decision is rational. *See id.* at 43, 103 S.Ct. 2856.

The BCA provides the defendants with broad authority. Generally speaking, the BCA authorizes the defendants to take all necessary actions to implement

closure or realignment of military installations. *See* § 2905(a)(1)(A). Those actions include acquiring land, constructing replacement facilities, and conducting the advance planning and design required to relocate functions from a closed or realigned installation to another installation. *See id.*

The plaintiff challenges the defendants' decision to transfer Fort Ritchie to Pen Mar. The Defense Base Closure and Realignment Act of 1994 ("DBCRA") is an attempt to legislate the process by which domestic military installations are closed and realigned. The DBCRA provides a selection process for unneeded military installations to be closed or realigned. *See* Pub.L. No. 101-510, §§ 2901-2910, 104 Stat. 1808 (1990), as amended by Pub.L. No. 102-190, § 2801, 105 Stat. 1290 (1991). Through the DBCRA, Congress established an independent Defense Base Closure and Realignment Commission ("the Commission") to meet in 1991, 1993, and 1995. *See id.* It requires the Secretary of Defense to develop a six-year force structure plan, which assesses national security threats and the force structure needed to meet such threats. *See Charles E. Smith Mgmt., Inc. v. Aspin*, 855 F.Supp. 852, 854 (E.D.Va.1994). The DBCRA also requires the Secretary of Defense to publish in the *Federal Register*, for notice and comment, the selection criteria the Secretary proposes to use to recommend installations for closure and realignment. *See id.* With these principles in mind and based on the record before it, the court concludes that the plaintiff has failed to demonstrate a likelihood of success on the merits of the plaintiff's claim that the

defendants' decision to transfer the property to Pen Mar was improper. *See Taylor*, 56 F.3d at 1506; *Sea Containers Ltd.*, 890 F.2d at 1208; *Holiday Tours, Inc.*, 559 F.2d at 843.

The defendants have offered several circumstances to support the defendants' decision to transfer the property to Pen Mar. Namely, the defendants assert that Pen Mar is a creature of Maryland statute set up to serve as the redevelopment authority for the purposes of managing the disposed property and as the single point of contact for redeveloping the base. Under this arrangement, Pen Mar is still leasing the property from the Army. As such, no transfer of title has taken place and, pursuant to the APA, no final agency decision has been completed. *See* 5 U.S.C. § 704. Further, no deed has been recorded showing the transfer of the property. Because it appears that the Army acted within the proper scope of its discretion, and because the Army appears to have provided a reasonable explanation for why it has not improperly transferred the property to Pen Mar, the plaintiff has failed to show a likelihood of success on the merits for this claim. *See id.*

Appendix E

(ii) The Plaintiff's Claim Relating to the Screening for Public Benefit Conveyance Under the Federal Property and Administrative Services Act and the BCA

The court now examines the plaintiff's right to maintain claims for equitable relief with respect to the screening for public benefit conveyance under the Federal Property and Administrative Services Act ("FPASA"). The FPASA was enacted in 1949 to establish an "economical and efficient system" for the procurement, utilization, and disposal of real and personal property under the control of federal agencies. *See* 40 U.S.C § 471 *et seq.* In furtherance of this policy, the statute directs federal agencies to maintain adequate inventories of the property under their control and to identify excess property for transfer to other agencies who are able to use it. *See* 63 Stat. 384, as amended 40 U.S.C. § 483(b)(c).[3] Property that has outlived its usefulness to the federal government is declared "surplus"[4] and may be transferred to private or other public entities. *See generally* 63 Stat. 385, as amended 40 U.S.C. § 484. The Administrator of the

3. The FPASA defines "excess property" as "property under the control of any federal agency which is not required for its needs and the discharge of its responsibilities." 63 Stat. 378, as amended 40 U.S.C § 472(e).

4. The FPASA defines "surplus property" as "any excess property not required for the needs and the discharge of the responsibilities of all [f]ederal agencies, as determined by the Administrator of the General Services Administration ("GSA")." 63 Stat. 379, as amended 40 U.S.C. § 472(g).

General Services Administration ("GSA") may determine the extent and amount of reimbursement for such transfers of excess property.[5] *See id.* at § 483(a).

The plaintiff contends that the court should interpret the BCA, in concert with the FPASA, as requiring the public benefit screening to take place before submission of the redevelopment plan to the U.S. Department of Defense ("DoD") and the U.S. Department of Housing and Urban Development ("HUD"). The court, however, sees no implicit or explicit directive in the statute or its legislative history requiring GSA to pay particular attention to the plaintiff's interests in deciding how to dispose of an excess or surplus site. *See Rhode Island Comm. on Energy v. GSA*, 561 F.2d 397, 402 (1st Cir.1977). At most, the statute guides GSA's actions in choosing among federal, public, and private entities requesting the conveyance of excess or surplus property. *See id.*

In the instant action, GSA does not have exclusive authority over the Fort Ritchie property because Fort Ritchie is a military installation[6] within the

5. The FPASA provides that GSA's Administrator shall have supervision and direction over the disposition of surplus property and establish guidelines for disposal by bid or negotiations. *See* 40 U.S.C. § 484.

6. *See* 10 U.S.C. §§ 2687, 2909(a). According to the Base Closure Act, a "military installation" is a base, camp, post, station, yard, center, homeport for any ship, or other activity

(Cont'd)

meaning of the BCA and, therefore, the defendants' recommendation to transfer the property to Pen Mar does not exceed the control and authority of the defendants provided by the BCA. Under the BCA, however, in order to expedite implementation of the Commission's recommendations, GSA delegates to DoD its statutory authority over the management and disposal of federal property on closed military bases. *See* 10 U.S.C. § 2687 note 9, § 2905(b)(1). In turn, DoD redelegates that authority to the individual armed services for their respective installations. *See* 41 C.F.R. § 101-47.6.

(Post-Federal Screening Process Under the McKinney Homeless Assistance Act)

After federal screening ends, the next step of the property disposal process takes place under the McKinney Homeless Assistance Act ("McKinney Act"). *See* 42 U.S.C. § 11411. The McKinney Act allows unutilized and underutilized federal property to be made available for use as homeless shelters. *See Nat'l Law Ctr. on Homelessness & Poverty v. United States Veterans Admin.*, 819 F.Supp. 69 (D.D.C.1993). Real property and facilities on a base scheduled to be shut down generally meet this definition. *See* 41 C.F.R. § 101-

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(Cont'd)

under the jurisdiction of DoD, including any leased facility. That term's definition does not include any facility used primarily for civil works, rivers and harbor projects, flood control, or other projects not under the primary jurisdiction or control of DoD.

47.9. Pursuant to the McKinney Act, the disposal agency submits a property description to HUD, which determines whether any of the property is suitable for use by the homeless and then the disposal agency publishes that determination in the *Federal Register*. *See* 42 U.S.C. § 11411. In an attempt to minimize conflicts, Congress amended the BCA to require a homeless provider to express interest in the property within 60 days, and then apply for the property within 90 days after HUD determines the property is suitable for use by the homeless. *See* § 2905, note 57. If a homeless provider fails to act within either of these prescribed periods, the local redevelopment authority may acquire the property under a right of first refusal for one year that is superior to any right which a homeless provider may have under the McKinney Act. *See id.* Accordingly, the Army's authority over the management and disposal of Fort Ritchie to Pen Mar fits within the meaning of the BCA. *See id.* Pursuant to the FPASA and the McKinney Act, Pen Mar *may* acquire the real surplus property through the public benefit screening process. *See* 41 C.F.R. § 101-47.3; 41 C.F.R. § 101-47.303; 3 C.F.R. § 197. The court concludes that the plaintiff has failed to demonstrate a likelihood of success on this claim. *See Taylor*, 56 F.3d at 1506; *Sea Containers Ltd.*, 890 F.2d at 1208; *Holiday Tours, Inc.*, 559 F.2d at 843.

(iii) The Plaintiff's Claim Relating to the Lack of Proper and Adequate Notice of the Availability of the Surplus Property at Fort Ritchie under the Base Closure Act

The court now turns to the plaintiff's claim that the defendants did not give proper and adequate notice of the availability of the surplus property at Fort Ritchie. Pursuant to the BCA, the notice criteria requires publication in the *Federal Register*. *See* 10 U.S.C. § 2687. The BCA specifically provides that upon the recognition of a redevelopment authority for an installation the Secretary of Defense shall publish information on buildings and property identified as excess property or surplus property in the *Federal Register* and in a newspaper of general circulation in the communities within the vicinity of the installation. *See* 10 U.S.C. § 2905(7)(B)(IV)(ii).

The plaintiff argues that the defendants' notice of the public benefit conveyance was inadequate. *See* Pl.'s Mem. in Supp. of Prelim. Inj. Mot. p. 2 ¶ 1. The plaintiff points to the notice as lacking information regarding the screening for public benefit conveyances. *See generally* Pl.'s Prelim. Inj. Mot. Under the BCA, however, the notice criteria clearly calls for the notice's publication in the *Federal Register* and a newspaper of general circulation. *See* 10 U.S.C. § 2905(7)(B)(IV)(ii). The defendants submitted to this court a notice published in the *Federal Register*, Vol. 61, No. 92 on Friday, May 10, 1996. *See* Def.'s Ex. 1. The defendants also submitted an announcement published under the

legal notices section of the Friday, May 10, 1996 edition of the *Herald-Mail*. *See* Def.'s Ex. 2. As such, it seems clear that compliance with the applicable notice criteria has been met by the defendants. *See* 10 U.S.C. § 2905(7)(B)(IV)(ii).

To be sure, in *Charles E. Smith Mgmt., Inc.*, the court interpreted the BCA notice provision to direct the Secretary of Defense to summarize in the *Federal Register* the process by which each installation was recommended for closure or realignment and to provide a justification for each recommendation. *See Charles E. Smith Mgmt., Inc.*, 855 F.Supp. at 854. Furthermore, the notice provision required publication of any proposed changes to the Secretary's recommendations in the *Federal Register* and to hold public hearings on the proposed changes. *See id.* Similarly, in *Cohen*, the Secretary was also required to formulate criteria for use in identifying bases for closure and realignment. *See Cohen*, 800 F.Supp. at 1009. The criteria had to be published in the *Federal Register* for public notice and comment. *See id.*

Accordingly, as stated earlier, the court believes that the defendants have subscribed to the notice requirement within the realm of surplus availability under the provisions of FPASA and the BCA. Indeed, the notices published by the defendants sufficiently detail the necessary information for a prospective party to submit a notice of interest to the redevelopment authority. *See* Def.'s Ex. 1, 2. Moreover, the plaintiff submitted to the court numerous articles obtained from

the press regarding the transfer of the Fort Ritchie property. *See* Pl.'s Ex. 2. As such, the plaintiff's argument that there was no specific notice given with respect to the public benefit conveyance is unpersuasive and misguided. The plaintiff is misinterpreting the BCA if it believes that the disposal agencies must extend a personal invitation to every party interested in surplus property. *See* § 2905(7)(b)(IV)(ii); *Charles Smith Mgmt., Inc.*, 855 F.Supp. at 854. To read such a requirement into the statute would contravene the very purpose of the BCA, that is, to publish a general public notice. *See id.* Because it appears that the Army complied with the notice requirements of the BCA, *Charles E. Smith Mgmt., Inc.*, 855 F.Supp. at 854; *accord Cohen*, 800 F.Supp. at 1009, the plaintiff cannot show a likelihood of success on the merits on this claim. *See Taylor*, 56 F.3d at 1506; *Sea Containers Ltd.*, 890 F.2d at 1208; *Holiday Tours, Inc.*, 559 F.2d at 843.

2. The Plaintiff Fails to Demonstrate That Irreparable Harm Would Result in the Absence of a Preliminary Injunction

Turning now to the second prong of the four-part test, for the court to grant a preliminary injunction, the plaintiff must show that irreparable harm will result absent immediate intervention by the court. *See Miami Building & Construction Trades Council v. Secretary of Defense*, 143 F.Supp.2d 19, 27 (D.D.C.2001). To constitute irreparable harm, the injury must be certain and great; it must be actual and not theoretical. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674

(D.C.Cir.1985). The plaintiff advances essentially two arguments to demonstrate irreparable harm: (1) that once the defendants transfer the surplus property to Pen Mar, the plaintiff will not be able to challenge the transfer, and will have no choice but to comply with the agency's decision and; (2) that if the defendants transfer title to Pen Mar, it will foreclose any opportunity to acquire the surplus property in the future. The court rejects both arguments.

First, the plaintiff's argument that compliance with an agency decision is irreparable harm is unsupported. *See CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C.Cir.1995). Under the APA, a final agency decision has not occurred. *See* 5 U.S.C. § 704; *Abbott Laboratories*, 387 U.S. at 151-52, 87 S.Ct. 1507; Def.'s Opp'n ¶ A. Even if Pen Mar takes and perfects title to the property, the plaintiff will continue to occupy the property under its sublease agreement with Pen Mar. *See* Pl.'s Ex. 9 ¶¶ 1.2, 1.4. Accordingly, the plaintiff will continue to conduct its academy for the remainder of the lease term even if the subject property eventually passes to Pen Mar. *See id.* This set of facts does not suggest that the plaintiff faces imminent irreparable harm. *See Miami Building* at 27; *Wisconsin Gas Co.*, 758 F.2d at 674.

Second, the plaintiff contends that if the defendants transfer title to Pen Mar, then the surplus property will be beyond reach for acquisition. The mere possibility of a transfer of title is not enough to substantiate a basis for irreparable harm. *See Connecticut v. Massachusetts*,

282 U.S. 660, 674, 51 S.Ct. 286, 75 L.Ed. 602 (1931); *accord Wisconsin Gas Co.*, 758 F.2d at 674. The implication of potential future acts is not the type of injury normally considered to be irreparable for purposes of a preliminary injunction. *See Wisconsin Gas Co.*, 758 F.2d at 674; *Ashland Oil Inc. v. FTC*, 409 F.Supp. 297, 307 (D.D.C.1976), *aff'd* 548 F.2d 977 (D.C.Cir.1976) (citations and internal quotations omitted). Moreover, the cases cited by the plaintiff do not support its argument. For example, the plaintiff makes reference to *National Coalition for Homeless v. U.S. Veterans' Admin.*, 695 F.Supp. 1226 (D.D.C.1988), where irreparable harm was found on the basis of a unique, imminent, and unprecedented crisis due to the lack of shelter for the homeless. *See id.* at 1234. In the instant action, no such crisis exists to warrant interim injunctive relief. *But see id.* Assuming *arguendo* that economic loss has or will occur as a result of the title transfer to Pen Mar, it is well established in this circuit that economic loss does not, in and of itself, constitute irreparable harm. *See Wisconsin Gas Co.* at 674. Along the same line of reasoning, the D.C. Circuit has pronounced that:

> [a] disappointed bidder that claims illegality in a procurement alleges an injury beyond its economic loss of the contract. The disappointed bidder may also claim injury to its right to a legally valid procurement process. This right is implicitly bestowed on all bidders by the mandatory language of the federal procurement statutes and by the

> contractual invitation to bid embodied in the solicitation.

See National Maritime Union of America v. Commander, MSC, 824 F.2d 1228, 1237 (D.C.Cir.1987) (citations omitted).

The plaintiff argues that it has been deprived of a legally valid procurement process and has thus suffered an irreparable injury. The court rejects this argument in light of the fact that the plaintiff has failed to persuade the court that it has presented a substantial case on the merits on its claim that the procurement process was legally invalid. *See O'Donnell Construction Company v. District of Columbia*, 963 F.2d 420 (D.C.Cir.1992) (finding irreparable harm present in a disappointed bidder action after determining the plaintiff had demonstrated a strong showing that it was likely to prevail on the merits). As the Supreme Court has recognized,

> the key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

See Sampson v. Murray, 415 U.S. 61, 88-90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974); *accord Wisconsin Gas Co.* 758 F.2d at 674.

Finally, while there may be some possibility that the Army may transfer the surplus property to Pen Mar during the pendency of the lawsuit, this is highly speculative. Furthermore, to the extent that the litigation has created uncertainty, the plaintiff itself has helped create the uncertainty by initiating the litigation. Accordingly, the plaintiff has not made a showing that irreparable harm will result absent immediate intervention by the court. *See Miami Building*, 143 F.Supp.2d at 27.

3. The Plaintiff Fails to Demonstrate That the Balance of Harms Favors the Issuance of a Preliminary Injunction

Turning to the third prong of the four-part test, for the court to grant a preliminary injunction, the plaintiff must show that other interested parties will not suffer substantial harm if the injunction is granted. *See Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F.2d 921 (D.C.Cir.1958). Assuming *arguendo* that the plaintiff has made the requisite showing on the first two prongs, the court would still conclude that the issuance of an injunction would have a serious adverse effect on other interested parties. *See id.* at 924-25. Relief saving one party from irreparable injury, at the expense of similar harm caused to another, might not qualify as the equitable judgment that an injunction represents. *See id.* at 925. The plaintiff, however, fails to demonstrate why the balance of harms favors the issuance of the requested interim injunctive relief. In addition, the plaintiff has not devoted substantial time and effort in

discussing the balance of harms factor. To wit, the plaintiff merely states, without providing any authority, that "[n]o one will be irreparably harmed if the court grants a TRO and a preliminary injunction." Pl.'s TRO Mot. at 18; Pl.'s Prelim. Inj. Mot. at 3 (repeating the same statement *verbatim*). As such, the plaintiff has failed to persuade the court of this point let alone convince the court that it has a basis to complain of potential losses or inconvenience to other parties. *See Virginia Petroleum Jobbers Assoc.* at 921, 925. Accordingly, the plaintiff has not made the necessary showing with respect to the third prong of the four-part test that would favor issuance of a preliminary injunction. *See Taylor*, 56 F.3d at 1506; *Sea Containers Ltd.*, 890 F.2d at 1208; *Holiday Tours, Inc.*, 559 F.2d at 843.

4. The Plaintiff Fails to Demonstrate That the Public Interest Favors the Issuance of a Preliminary Injunction

Finally, the court examines the last prong of the four-part test against the claims made by the plaintiff in its motions for injunctive relief. Here too, the plaintiff has not developed its argument to justify such relief. The plaintiff has not devoted substantial time in discussing the public interest considerations, as such, it is unnecessary to address this issue at length. The court notes that no authority has been advanced to buttress the plaintiff's conclusory assertion that "[t]he public interest is . . . served by requiring the [d]efendants to comply with the law . . ." Pl.'s TRO Mot.

at 19; Pl.'s Prelim. Inj. Mot. at 3. Moreover, this court recognizes that the public has an interest in seeing the congressionally created process of transferring title to closed military bases under the BCA continue. Even if the court assumes the plaintiff's assertion is correct with respect to the public interest prong, it does not outweigh the court's determination that the plaintiff has failed to demonstrate a likelihood of success on the merits or that it would suffer irreparable harm without a temporary restraining order or preliminary injunction. *See Taylor*, 56 F.3d at 1506; *Sea Containers Ltd.*, 890 F.2d at 1208; *Holiday Tours, Inc.*, 559 F.2d at 843.

IV. CONCLUSION

For all of the foregoing reasons, the court denies the plaintiff's motions for a temporary restraining order and a preliminary injunction. Because the court denies the complaint's requested relief in whole, the court denies as moot the defendants' motion to dismiss the complaint with prejudice. Further, the court denies as moot the plaintiff's motions for expedited consideration of the plaintiff's motion for a preliminary injunction, for a hearing on that motion, and for production of documents. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this 14th day of January 2002.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 11, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5294 **September Term 2007**

01cv01595

Filed On: April 11, 2008

Role Models America, Inc.,

Appellant

v.

Pete Geren, Secretary of the Army and Margaret Spellings, Secretary of Education,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

Appendix F

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX G — STATUTES AND REGULATIONS

10 U.S.C. § 2687. Base closures and realignments

(a) Notwithstanding any other provision of law, no action may be taken to effect or implement—

> (1) the closure of any military installation at which at least 300 civilian personnel are authorized to be employed;
>
> * * *
>
> unless and until the provisions of subsection (b) are complied with.

(b) No action described in subsection (a) with respect to the closure of, or a realignment with respect to, any military installation referred to in such subsection may be taken unless and until—

> (1) the Secretary of Defense or the Secretary of the military department concerned notifies the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives, as part of an annual request for authorization of appropriations to such Committees, of the proposed closing or realignment and submits with the notification an evaluation of the fiscal, local economic, budgetary, environmental, strategic, and operational consequences of such closure or realignment; and

(2) a period of 30 legislative days or 60 calendar days, whichever is longer, expires following the day on which the notice and evaluation referred to in clause (1) have been submitted to such committees, during which period no irrevocable action may be taken to effect or implement the decision.

* * *

10 U.S.C. § 2687 (Notes)

* * *

Sec. 2905. Implementation

(b) Management and disposal of property.

(1) The Administrator of General Services shall delegate to the Secretary of Defense, with respect to excess and surplus real property, facilities, and personal property located at a military installation closed or realigned under this part—

* * *

(B) the authority of the Administrator to dispose of surplus property under subchapter III of chapter 5 of title 40, United States Code [40 USCS §§ 541 et seq.];

(2)

(A) Subject to subparagraph (B) and paragraphs (3), (4), (5), and (6), the Secretary of Defense shall exercise the authority delegated to the Secretary pursuant to paragraph (1) in accordance with—

(i) all regulations governing the utilization of excess property and the disposal of surplus property under the Federal Property and Administrative Services Act of 1949 [former 40 USCS §§ 471 et seq.; for similar provisions, see 40 USCS §§ 101 et seq.]; and

* * *

(D) Before any action may be taken with respect to the disposal of any surplus real property or facility located at any military installation to be closed or realigned under this part, the Secretary of Defense shall consult with the Governor of the State and the heads of the local governments concerned for the purpose of considering any plan for the use of such property by the local community concerned.

* * *

(5)

(A) Except as provided in subparagraphs (B) and (C), the Secretary shall take such actions as the Secretary determines necessary to ensure that final determinations under paragraph (1) regarding whether another department or agency of the Federal Government has identified a use for any portion of a military installation to be closed or realigned under this part, or will accept transfer of any portion of such installation, are made not later than 6 months after the date of approval of closure or realignment of that installation.

* * *

(6)

(A) Except as provided in this paragraph, nothing in this section shall limit or otherwise affect the application of the provisions of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11301 et seq.) to military installations closed under this part. For procedures relating to the use to assist the

homeless of buildings and property at installations closed under this part after the date of the enactment of this sentence [Oct. 25, 1994], see paragraph (7).

* * *

(7)

* * *

(B)

(i) Not later than the date on which the Secretary of Defense completes the final determinations referred to in paragraph (5) relating to the use or transferability of any portion of an installation covered by this paragraph, the Secretary shall—

* * *

(IV) publish in the Federal Register and in a newspaper of general circulation in the communities in the vicinity of the installation information

on the buildings and property identified under subclause (II).

(ii) Upon the recognition of a redevelopment authority for an installation covered by this paragraph, the Secretary of Defense shall publish in the Federal Register and in a newspaper of general circulation in the communities in the vicinity of the installation information on the redevelopment authority.

(C)

(i) State and local governments, representatives of the homeless, and other interested parties located in the communities in the vicinity of an installation covered by this paragraph shall submit to the redevelopment authority for the installation a notice of the interest, if any, of such governments, representatives, and parties in the buildings or property, or any portion thereof, at the installation that are identified under subparagraph (B)(i)(II). A notice of interest under

this clause shall describe the need of the government, representative, or party concerned for the buildings or property covered by the notice.

(ii) The redevelopment authority for an installation shall assist the governments, representatives, and parties referred to in clause (i) in evaluating buildings and property at the installation for purposes of this subparagraph.

(iii) In providing assistance under clause (ii), a redevelopment authority shall—

(I) consult with representatives of the homeless in the communities in the vicinity of the installation concerned; and

(II) undertake outreach efforts to provide information on the buildings and property to representatives of the homeless, and to other persons or entities interested in assisting the homeless, in such communities.

(iv) It is the sense of Congress that redevelopment authorities should

begin to conduct outreach efforts under clause (iii)(II) with respect to an installation as soon as is practicable after the date of approval of closure or realignment of the installation.

(D)

(i) State and local governments, representatives of the homeless, and other interested parties shall submit a notice of interest to a redevelopment authority under subparagraph (C) not later than the date specified for such notice by the redevelopment authority.

(ii) The date specified under clause (i) shall be—

(I) in the case of an installation for which a redevelopment authority has been recognized as of the date of the completion of the determinations referred to in paragraph (5), not earlier than 3 months and not later than 6 months after the date of publication of such determination in a newspaper of general circulation in the

communities in the vicinity of the installation under subparagraph (B)(i)(IV); and

(II) in the case of an installation for which a redevelopment authority is not recognized as of such date, not earlier than 3 months and not later than 6 months after the date of the recognition of a redevelopment authority for the installation.

(iii) Upon specifying a date for an installation under this subparagraph, the redevelopment authority for the installation shall—

(I) publish the date specified in a newspaper of general circulation in the communities in the vicinity of the installation concerned; and

(II) notify the Secretary of Defense of the date.

* * *

Appendix G

(K)

* * *

(v) In the case of a request for a conveyance under clause (i) of buildings and property for public benefit under section 550 of title 40, United States Code, or sections 47151 through 47153 of title 49, United States Code, the sponsoring Federal agency shall use the eligibility criteria set forth in such section or such subchapter (as the case may be) to determine the eligibility of the applicant and use proposed in the request for the public benefit conveyance. The determination of such eligibility should be made before submission of the redevelopment plan concerned under subparagraph (G).

* * *

(P) For purposes of this paragraph, the term "other interested parties," in the case of an installation, includes any

parties eligible for the conveyance of property of the installation under section 550 of title 40, United States Code, or sections 47151 through 47153 of title 49, United States Code, whether or not the parties assist the homeless.

Appendix G

24 C.F.R. § 586.5. Definitions

As used in this part:

* * *

Public benefit transfer. The transfer of surplus military property for a specified public purpose at up to a 100 percent discount in accordance with 40 U.S.C. 471 et seq., or 49 U.S.C. 47151-47153.

* * *

Representative(s) of the homeless. A State or local government agency or private nonprofit organization, including a homeless assistance planning board, that provides or proposes to provide services to the homeless.

Appendix G

24 C.F.R. § 586.20. Overview of the process.

(a) Recognition of the LRA. As soon as practicable after the list of installations recommended for closure or realignment is approved, DoD, through OEA, will recognize an LRA for the installation. Upon recognition, OEA shall publish the name, address, and point of contact for the LRA in the Federal Register and in a newspaper of general circulation in the communities in the vicinity of the installation.

* * *

(c) Responsibilities of the LRA. The LRA should begin to conduct outreach efforts with respect to the installation as soon as is practicable after the date of approval of closure/realignment of the installation. The local reuse planning process must begin no later than the date of the Military Department's Federal Register publication of available property described at Sec. 586.20(b). For those installations that began the process described in this part prior to August 17, 1995, HUD will, on a case by case basis, determine whether the statutory requirements have been fulfilled and whether any additional requirements listed in this part should be required. Upon the Federal Register publication described in Sec. 586.20(b), the LRA shall:

(1) Publish, within 30 days, in a newspaper of general circulation in the communities in the vicinity of the installation, the time period during which the LRA will receive notices of interest from State and local governments, representatives of the homeless, and other interested parties. This publication shall include the name, address, telephone number and the point of contact for the LRA who can provide information on the prescribed form and contents of the notices of interest. The LRA shall notify DoD of the deadline specified for receipt of notices of interest. LRAs are strongly encouraged to make this publication as soon as possible within the permissible 30 day period in order to expedite the closure process.

* * *

(5) Develop an application, including the redevelopment plan and homeless assistance submission, explaining how the LRA proposes to address the needs of the homeless. This application shall consider the notices of interest received from

State and local governments, representatives of the homeless, and other interested parties. This shall include, but not be limited to, entities eligible for public benefit transfers under either 40 U.S.C. 471 et seq., or 49 U.S.C. 47151-47153; representatives of the homeless; commercial, industrial, and residential development interests; and other interests. From the deadline date for receipt of notices of interest described at Sec. 586.20(c)(1), the LRA shall have 270 days to complete and submit the LRA application to the appropriate Military Department and HUD. The application requirements are described at Sec. 586.30.

* * *

(d) Public benefit transfer screening. The LRA should, while conducting its outreach efforts, work with the Federal agencies that sponsor public benefit transfers under either 40 U.S.C. 471 et seq. or 49 U.S.C. 47151-47153. Those agencies can provide a list of parties in the vicinity of the installation that might be interested in and eligible for public benefit transfers. The LRA should make a reasonable effort to inform such parties of the

availability of the property and incorporate their interests within the planning process. Actual recipients of property are to be determined by the sponsoring Federal agency. The Military Departments shall notify sponsoring Federal agencies about property that is available based on the community redevelopment plan and keep the LRA apprised of any expressions of interest. Such expressions of interest are not required to be incorporated into the redevelopment plan, but must be considered.

24 C.F.R. § 586.45. Disposal of buildings and property.

(a) Public benefit transfer screening. Not later than the LRA's submission of its redevelopment plan to DoD and HUD, the Military Department will conduct an official public benefit transfer screening in accordance with the Federal Property Management Regulations (41 CFR part 101-47.303-2) based upon the uses identified in the redevelopment plan. Federal sponsoring agencies shall notify eligible applicants that any request for property must be consistent with the uses identified in the redevelopment plan. At the request of the LRA, the Military Department may conduct the official State and local public benefit screening at any time after the publication of available property described at Sec. 586.20(b).

Appendix G

32 C.F.R. § 176.5. Definitions

As used in this part:

* * *

Public benefit transfer. The transfer of surplus military property for a specified public purpose at up to a 100-percent discount in accordance with 40 U.S.C. 471 et seq. or 49 U.S.C. 47151–47153.

* * *

Representative(s) of the homeless. A State or local government agency or private nonprofit organization, including a homeless assistance planning board, that provides or proposes to provide services to the homeless.

Appendix G

32 C.F.R. §176.20. Overview of the process.

(a) Recognition of the LRA. As soon as practicable after the list of installations recommended for closure or realignment is approved, DoD, through OEA, will recognize an LRA for the installation. Upon recognition, OEA shall publish the name, address, and point of contact for the LRA in the Federal Register and in a newspaper of general circulation in the communities in the vicinity of the installation.

* * *

(c) Responsibilities of the LRA. The LRA should begin to conduct outreach efforts with respect to the installation as soon as is practicable after the date of approval of closure/realignment of the installation. The local reuse planning process must begin no later than the date of the Military Department's Federal Register publication of available property described at § 176.20(b). For those installations that began the process described in this part prior to August 17, 1995, HUD will, on a case-by-case basis, determine whether the statutory requirements have been fulfilled and whether any additional requirements listed in this part should be

required. Upon the Federal Register publication described in § 176.20(b), the LRA shall:

> (1) Publish, within 30 days, in a newspaper of general circulation in the communities in the vicinity of the installation, the time period during which the LRA will receive notices of interest from State and local governments, representatives of the homeless, and other interested parties. This publication shall include the name, address, telephone number and the point of contact for the LRA who can provide information on the prescribed form and contents of the notices of interest. The LRA shall notify DoD of the deadline specified for receipt of notices of interest. LRAs are strongly encouraged to make this publication as soon as possible within the permissible 30 day period in order to expedite the closure process.
>
> * * *
>
> (5) Develop an application, including the redevelopment plan and homeless assistance submission,

explaining how the LRA proposes to address the needs of the homeless. This application shall consider the notices of interest received from State and local governments, representatives of the homeless, and other interested parties. This shall include, but not be limited to, entities eligible for public benefit transfers under either 40 U.S.C. 471 et. seq., or 49 U.S.C. 47151–47153; representatives of the homeless; commercial, industrial, and residential development interests; and other interests. From the deadline date for receipt of notices of interest described at § 176.20(c)(1), the LRA shall have 270 days to complete and submit the LRA application to the appropriate Military Department and HUD. The application requirements are described at § 176.30.

* * *

(d) Public benefit transfer screening. The LRA should, while conducting its outreach efforts, work with the Federal agencies that sponsor public benefit transfers under either 40 U.S.C. 471 et. seq. or 49 U.S.C. 47151–47153. Those agencies can provide a list of

parties in the vicinity of the installation that might be interested in and eligible for public benefit transfers. The LRA should make a reasonable effort to inform such parties of the availability of the property and incorporate their interests within the planning process. Actual recipients of property are to be determined by sponsoring Federal agency. The Military Departments shall notify sponsoring Federal agencies about property that is available based on the community redevelopment plan and keep the LRA apprised of any expressions of interest. Such expressions of interest are not required to be incorporated into the redevelopment plan, but must be considered.

Appendix G

32 C.F.R. § 176.45. Disposal of buildings and property.

(a) Public benefit transfer screening. Not later than the LRA's submission of its redevelopment plan to DoD and HUD, the Military Development will conduct an official public benefit transfer screening in accordance with the Federal Property Management Regulations (41 CFR 101–47.303–2) based upon the uses identified in the redevelopment plan. Federal sponsoring agencies shall notify eligible applicants that any request for property must be consistent with the uses identified in the redevelopment plan. At the request of the LRA, the Military Department may conduct the official State and local public benefit screening at any time after the publication of available property described at § 176.20(b).

No. 08-59

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In the Supreme Court of the United States

ROLE MODELS AMERICA, INC., PETITIONER

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly interpreted its own mandate in an earlier appeal.

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In the Supreme Court of the United States

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ROLE MODELS AMERICA, INC., PETITIONER

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-7a, 54a-66a) are reported at 514 F.3d 1308 and 317 F.3d 327, respectively. The opinion of the district court that was the subject of the second appeal (Pet. App. 8a-28a) is reported at 459 F. Supp. 2d 28. One earlier opinion of the district court (Pet. App. 29a-53a) is unreported, and another opinion (Pet. App. 67a-93a) is reported at 193 F. Supp. 2d 76.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2008. A petition for rehearing was denied on April 11, 2008 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on July 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Base Closure and Realignment Act of 1990 (DBCRA), Pub. L. No. 101-510, Tit. XXIX, Pt. A, 104 Stat. 1808, as amended (10 U.S.C. 2687 note), establishes a mechanism for the "timely closure and realignment of military installations inside the United States." DBCRA § 2901(b).[1] Under the statute and its implementing regulations, once a property is recommended for closure, a screening process takes place to determine how the property will be utilized and reused. The disposal of excess military property proceeds in four stages: first, the Secretary of Defense determines whether the Department of Defense has a need for the excess property; second, if not, the Secretary determines whether any other federal agency has a need for the property; third, if no federal agency has a need for the surplus property, the Secretary determines whether the surplus property is needed for any public benefit use by a state, local, or non-profit entity; fourth, if no public use is apparent, the property may be used for private commercial uses. DBCRA § 2905(b)(5) and (7); Pet. App. 55a-57a.

The process is explained more fully by the court of appeals, see generally Pet. App. 55a-56a, but in summary: If the Secretary reaches the third stage—by determining that no military service or federal agency has a need for the property—the Secretary is required to publish in the *Federal Register* and in a local general-circulation newspaper an announcement of the surplus

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[1] For ease of reference (and consistency with the petition for a writ of certiorari and the opinions of the court of appeals and the district court), all citations to the DBCRA are to the relevant sections of the Act, as amended and codified in a note following 10 U.S.C. 2687.

property. DBCRA § 2905(b)(7)(B)(i). Public and private entities may then submit a notice of interest in the property. DBCRA § 2905(b)(7)(C)(i). As part of that process, the Local Redevelopment Authority (LRA) is required to publish in a general-circulation newspaper in the local communities a notice stating the time period during which it will receive notices of interest from "representatives of the homeless[] and other interested parties." 24 C.F.R. 586.20(c)(1); 32 C.F.R. 176.20(c)(1).[2]

The LRA prepares a comprehensive redevelopment plan for the surplus property, in which the LRA "consider[s] the interests in the use [of the property] to assist the homeless." DBCRA § 2905(b)(7)(F)(i). The plan is submitted to the Secretary of Housing and Urban Development (HUD), who evaluates it to determine, among other things, whether it appropriately balances the need for "economic redevelopment" with the "needs of the homeless." DBCRA § 2905(b)(7)(G) and (H)(i)(III). But before the LRA submits its redevelopment plan to HUD, the Secretary of Defense separately evaluates any notices of interest submitted by other interested parties (*i.e.*, those expressing an interest in using the property for a public benefit other than homeless assistance) and determines whether an applicant and its proposed use are eligible for a "public benefit conveyance." DBCRA § 2905(b)(7)(K)(v); Pet. App. 57a. When both aspects of the process are finished, the Secretary of Defense is to dispose of the remaining base property, giving "sub-

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[2] An "other interested party" is an eligible "public and non-profit entit[y] interested in obtaining property via a public benefit transfer *other than a homeless assistance conveyance* under either 40 U.S.C. § 471 *et[seq.* or 49 U.S.C. § 47151-47153." 32 C.F.R. 176.20(c)(1)(i) (emphasis added).

stantial deference" to the LRA's redevelopment plan. DBCRA § 2905(b)(7)(K)(i) and (iii).

2. On September 8, 1995, Congress designated Fort Ritchie, Maryland, for closure under the DBCRA. Pet. App. 10a. Fort Ritchie was a "U.S. Army base located in the Catoctin mountains of western Maryland," purchased originally by Maryland in 1926 for use as a training site for its national guard. *Id.* at 57a. Pursuant to the DBCRA requirements, on May 10 and May 15, 1996, the Army published a notice in the *Federal Register* and *The Herald-Mail*, a local newspaper near Fort Ritchie, announcing that Fort Ritchie was surplus military property. 61 Fed. Reg. 21,445 (1996); *Notice of Availability of Surplus Land and Buildings in Accordance with Public Law 103-421 Located at Fort Ritchie Military Reservation, Cascade, MD*, The Herald-Mail, May 15, 1996, at C8; Pet. App. 58a. The Fort Ritchie LRA also prepared notices, entitled "Homeless Assistance Outreach Initiative," inviting the submission of notices of interest in the surplus property by providers of homeless assistance. *Id.* at 58a-60a. On May 10, 1996, the Fort Ritchie LRA, later renamed PenMar Development Corporation (PenMar), published notices in local newspapers announcing the deadline for submitting notices of interest regarding the surplus Fort Ritchie property. *Id.* at 58a. The Secretary of Defense, however, did not conduct a screening for public benefit conveyances. *Id.* at 60a.

In December 1997, PenMar submitted its redevelopment plan to HUD. Following HUD's approval, the Secretary of Defense published a "Record of Decision" that accepted the plan, thus obligating the Secretary under the DBCRA to dispose of the property in accordance with the plan. Pet. App. 60a.

3. a. Petitioner is a Maryland non-profit and tax-exempt corporation that intended to provide military-style high schools for at-risk youth in the United States and sought to acquire the Fort Ritchie property through a public benefit conveyance. Pet. App. 69a, 71a. It filed this suit under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, citing the failure to conduct a screening for public benefit conveyances. Pet. App. 61a. Petitioner requested declaratory and injunctive relief against the Secretary of the Army and the Secretary of Education to prevent the conveyance of Fort Ritchie to PenMar under the DBCRA. Petitioner alleged that there had been an improper screening of the Fort Ritchie property for a public benefit conveyance. *Id.* at 61a, 71a. On January 15, 2002, the district court denied petitioner's motion for a temporary restraining order and a preliminary injunction. *Id.* at 67a-93a.

b. The court of appeals reversed and remanded. Pet. App. 54a-66a. It concluded that the two notices published in local newspapers by the LRA were defective, in that they failed to fulfill the LRA's obligation to notify "other interested parties" of the deadline for submitting notices of interest in the Fort Ritchie property. *Id.* at 64a. In particular, the court of appeals held that the notices were directed only to providers of homeless assistance and did not provide adequate notice to "other interested parties," including petitioner, which the court described as "an organization devoted to establishing schools for at-risk minors." *Id.* at 63a. The court also held that, although the Army's May 15, 1996, notices fulfilled the requirements of the DBCRA, they did not also satisfy the LRA's own obligation to publish separate notices. *Id.* at 64a.

The court of appeals concluded that the LRA's failure to give proper notification to "other interested parties" contributed to the absence of any notices of interest from non-profit educational institutions (like petitioner) who might have been interested in a public benefit use for the Fort Ritchie property. Pet. App. 66a. Because the court concluded that respondents had failed to conduct a proper screening of the Fort Ritchie property for conveyance to non-profit educational institutions, it reversed and remanded with instructions that the district court enter a permanent injunction against the conveyance of Fort Ritchie until the government had remedied that procedural error. *Ibid.*

c. Pursuant to the DBCRA and the mandate of the court of appeals, the Army published remedial notices in the *Federal Register* (68 Fed. Reg. 57,436) and local newspapers in October 2003, advertising the surplus property at Fort Ritchie to "other interested parties." Pet. App. 4a. The LRA similarly published revised notices in newspapers in the vicinity of Fort Ritchie inviting notices of interest from "other interested parties." *Id.* at 47a.

Petitioner then applied to the Department of Education for a no-cost public benefit conveyance of the surplus real property for use as its school. The Department of Education eventually denied the application. Pet. App. 4a.

On October 15, 2004, respondents moved to dismiss and dissolve the injunction against conveyance, arguing that they had cured the procedural defect identified in the mandate of the court of appeals. Pet. App. 13a. The district court agreed that the revised notices to "other

interested parties" were sufficient.[3] The court declined to lift the injunction, however, because it concluded that the government had not complied with a different procedural obligation under the DBCRA—that HUD's approval of the redevelopment plan occur only *after* the screening of all interested parties seeking public benefit conveyances had been completed. *Id.* at 50a-51a. HUD had approved the redevelopment plan *prior* to the completion of the screening on remand. *Ibid.*

d. The government did not appeal at that time. Rather, in response to the decision, PenMar sent HUD a revised Fort Ritchie Comprehensive Redevelopment Plan in June 2005. HUD approved the revised plan. Pet. App. 5a.

In November 2005, respondents filed a second motion to dismiss, alleging that the defect identified by the district court had been cured. Before the district court ruled on that motion, petitioner filed an amended complaint raising additional claims. Among other things, petitioner—which previously claimed to be an "other interested party" entitled to consideration for a "public benefit conveyance," and thus secured a remand to remedy the failure to screen for public benefit uses—now claimed to be a provider of homeless assistance. Petitioner alleged that the government had violated the statute by failing to *re*-screen for homeless providers *at the same time* it screened for "other interested parties" pursuant to the court of appeals' decision. Pet. App. 5a.

On September 28, 2006, the district court granted respondents' motion to dismiss, holding that petitioner lacks standing to bring the new claim under the DBCRA

[3] The district court also stated that it understood the court of appeals to have held that the earlier notice to homeless-assistance providers was adequate. Pet. App. 39a.

because it "is not a homeless provider" and because it had not been injured by the failure to conduct a rescreening for public benefit conveyances at the same time as a rescreening for homeless providers. Pet. App. 18a-20a & n.4. (The district court also found that petitioner lacks standing to bring claims under other statutes. *Id.* at 21a-25a.) The court dissolved the injunction, thereby permitting the conveyance of Fort Ritchie to PenMar.

e. The court of appeals unanimously affirmed. Pet. App. 1a-7a. The court observed that whether petitioner is "a homeless provider" was "beside the point," in light of its own earlier remand for implementation of a limited remedy. *Id.* at 6a. Noting that petitioner had sued to challenge the failure to give notice for "other interested parties" and that the court of appeals' earlier decision had concerned petitioner's claim for a public benefit conveyance, the court stated that it had "made clear that we were remanding only for the rescreening of other interested parties." *Ibid.* Thus, the "mandate rule" limited the district court to ordering a rescreening for "other interested parties" and barred it from ordering a rescreening for homeless providers. *Ibid.*[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of any other court of appeals or this Court. Accordingly, further review is not warranted.

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[4] The court of appeals also rejected petitioner's claim under the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, holding that petitioner, which sought to use the property for an education facility, was outside the zone of interests protected by that statute. Pet. App. 7a.

1. The court of appeals affirmed the dismissal of the complaint on the ground that its mandate in the earlier appeal directed the district court to enjoin transfer of the property until there had been a screening for "other interested parties," not for homeless providers: "Our opinion made clear that we were remanding only for the rescreening of other interested parties." Pet. App. 6a. As the court explained:

> In our earlier opinion, we noted that [petitioner] filed suit "[c]laiming that it was entitled to a public benefit conveyance screening regarding the Fort Ritchie property" because [respondents] did not screen for "other interested parties." [Pet. App. 61a]. We explained, "[i]f the Secretary of Defense determines that an 'other interested' applicant meets the eligibility standards . . . the Secretary effects a 'public benefit conveyance' of the requested property to that party," *id.* at [57a], and concluded that the failure to publish notice for other interested parties "prevented [petitioner] from triggering a public benefit conveyance screening." *Id.* at [66a].

Pet. App. 6a.

The court of appeals correctly interpreted the mandate of its earlier decision. That is unsurprising. "[T]he court that issues a mandate is normally the best judge of its content," although that interpretation does not strictly bind this Court. *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940).

2. Indeed, petitioner does not even try to dispute the scope of the mandate. Rather, petitioner asserts that the courts below erred in allowing the earlier mandate to preclude consideration of what petitioner alleges are *new* issues raised in its amended complaint. Pet. 22-28.

But petitioner's only new issue is its new claim that it actually is a homeless provider with the right to demand a *simultaneous re*screening for homeless providers *in addition to* the rescreening for "other interested parties" that the court of appeals ordered in its earlier decision.

The court of appeals was not required to address that issue in the current appeal.[5] Petitioner had litigated this case for several years on the theory that it was an "other interested party" that had been left out of the original notices and screenings, which the courts determined had been directed only to providers of homeless assistance. Pet. App. 63a (court of appeals' reference to the screening notice's "message that the LRA's exclusive interest was in proposals to help the homeless"); see *id.* at 39a (district court's interpretation of court of appeals' first decision "as holding that the defendants' notice to homeless providers was adequate"). The court of appeals did not have to reopen the predicate for the first appeal and remand, shared by all in this litigation, that the initial notice to—and screening for—homeless providers was unassailable. Nor was the court of appeals' refusal to reopen the issue a denial of due process to petitioner. See Pet. 27-28.[6]

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[5] To the extent petitioner claims that the court of appeals' decision was inconsistent with petitioner's unfettered right to amend its complaint to add new claims (Pet. 25-26), the court of appeals did not address Rule 15 of the Federal Rules of Civil Procedure. Thus, even if the court erred, petitioner could request only case-specific error correction rather than resolution of any split in the circuits about how Rule 15 should apply after a remand.

[6] Petitioner suggests (Pet. 24) that the result in this case conflicts with the Fifth Circuit's decision in *United States* v. *Lee*, 358 F.3d 315 (2004), which noted that the mandate rule used for resentencing in

Petitioner's new claim turns on its assertion (Pet. 3, 17, 20, 29, 30) that the DBCRA requires the public benefit screening to occur *at the same time* as the screening for homeless providers, notwithstanding the fact that the two screenings are done by different agencies. Even assuming that is an accurate construction of the statute in the abstract, that would not mean that it is the only way to implement the statutory scheme in light of a judicial remand to remedy certain mistakes in administrative procedure. See Pet. App. 66a. Remands in the administrative-law context may contemplate discrete fixes tailored to the relevant error, without requiring the agency to rerun all parts of its decision making process from the beginning. See, *e.g.*, *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 374 (1939) ("If [agency] findings are lacking which may properly be made upon the evidence already received, the court['s remand] does not require the evidence to be reheard.").

Moreover, neither the district court nor the court of appeals addressed whether the screenings under the DBCRA must be simultaneous (either in the abstract or

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criminal cases does not preclude the consideration of an issue on remand that "could *not* have been raised in the initial appeal." *Id.* at 323. But the "new" issue in *Lee* (whether to grant a discretionary upward departure) went unaddressed in the first appeal only because it was not appealable, not because the government had failed to raise it until after the remand. See *id.* at 324. Here, petitioner did not raise the simultaneous-screening issue before (or during) the first appeal. Moreover, doing so would not have required petitioner to address "every possible contingency" that could affect the rest of the case. Pet. 24 (quoting *Lee*, 358 F.3d at 324). It would only have required petitioner to know that it wanted to be considered a provider of homeless assistance—a desire that would have been inconsistent with its original lawsuit and appeal, which were based on the very proposition that a notice addressed to homeless providers did not serve as adequate notice to petitioner.

as part of a judicially ordered remedy), and petitioner does not suggest that there is any conflict in the lower courts on that question. In addition, that question would not even need to be addressed in this case unless the district court's standing decision were reversed.

3. In any event, whether the court of appeals was correct in its interpretation of its own mandate does not warrant this Court's exercise of its certiorari jurisdiction. This case presents no question of broad applicability. To the contrary, the petition offers only a fact-based inquiry that would turn on an analysis of the specific history of this litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2008